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CONSEIL DE L'EUROPE

JUDICIAL POWER AND PUBLIC LIABILITY FOR JUDICIAL ACTS

Proceedings of the Fifteenth Colloquy on European Law

Bordeaux, 17-19 June 1985

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FOREWORD

The aim of the Council of Europe, which organised the 15th Colloquy on European Law in collaboration with the Ecole Nationale de la Magistrature, is to achieve greater unity among its 21 member States, particularly in legal matters, by concluding international treaties and adopting recommendations addressed to the governments of member States, and by developing common legislative policies.

In furtherance of this aim, it works constantly to research, study and assess the phenomena and problems of contemporary European society. Since 1969 Colloquies on European law have accordingly been organised in a different country each year which can on occasion lead to concrete proposals.

The 15th Colloquy on European Law, held in Bordeaux from 17 to 19 June 1985, took as its theme "Judicial power and public liability for judicial acts".

Held at the headquarters of the Ecole Nationale de la Magistrature in Bordeaux, some seventy members of the legal profession (judges, trainee judges, professors of law, senior officials from States taking part in the Colloquy and representatives of international organisations) were present.

During the inaugural session, speeches were made by Mr Pierre Lyon-Caen, chargé de mission to the French Minister of Justice and representing the latter, by Mr Raymond Exertier, Director of the Ecole Nationale de la Magistrature, and by Mrs Marie-Odile Wiederkehr, Head of Division, representing the Secretary General of the Council of Europe.

The discussions were based on four background reports: "The independence of the judiciary" by Mr L Blom-Cooper QC (London); "The role of the judge in a changing society" by Professor F Kübler (Frankfurt); "The different forms of personal liability of the judge" by Mr F Morozzo della Rocca, Deputy Public Prosecutor at the Court of Cassation (Rome); and "Essential elements for a legal regime governing public liability for judicial acts" by Mr J Velu, Advocate General at the Cour de Cassation and Professor at the Free University of Brussels.

The first element to emerge from the discussions was the increasing importance of the judge's role in modern democratic societies.

The discussions also showed to what extent the exercise of judicial office in the European States is influenced by a number of factors (the training of judges, the existence of career opportunities, and systems designed to ensure discipline within the judiciary, etc) likely to limit the harm which might result from judicial acts.

Finally, the participants considered the desirability of prescribing legal rules on public liability to provide compensation for loss or damage resulting from a judicial act.

At the end of the discussion, a general report was presented by Mr Agostini, Professor at the Faculty of Law of Bordeaux University.

The conclusions of the Colloquy were transmitted to the Committee of Ministers of the Council of Europe by the European Commiteee on Legal Co-operation (CDCJ).

This publication contains all the documents presented at the Colloquy.

ADDRESS

by

Mrs Marie-Odile Wiederkehr, Head of Division,
representing the Secretary General of the Council of Europe

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1. I am honoured to have been instructed by the Secretary General of the Council of Europe to meet and welcome everybody here at the Ecole Nationale de la Magistrature for the 15th Colloquy on European Law. The Secretary General regrets that his commitments did not allow him to come to Bordeaux and has asked me to give you his best wishes for the success of the Colloquy.

2. The Council of Europe greatly appreciates the active interest shown by the Minister of Justice in this Colloquy. Since this is a particularly busy time of the year, he is unable to leave Paris but was kind enough to send Mr Pierre Lyon-Caen as his representative who will address you on behalf of Mr Badinter, for which we would like to express our thanks. None of this would have been possible without the help of the Ecole Nationale de la Magistrature who are our hosts today in these remarkable surroundings, where ancient and modern buildings have been so beautifully integrated. I would like to express my thanks first of all to the Director of the Ecole, Mr Exertier, who is taking part in our work and who has agreed to talk about the role and duties of the Ecole in the training of judges, a subject directly linked with the concerns of the Colloquy.

The Council of Europe is extremely grateful to the Ecole and to its Director for having hosted the Colloquy and undertaken to organise it. I would like to mention especially the Ecole's Secretary General, Mr Cordier, who since late last year has removed one by one the various obstacles which never fail to appear in the path of the organisers of a colloquy. The most recent and the most difficult to resolve was that of participants' accommodation for which we have had to go to Arcachon. I am sure that participants appreciate this opportunity to spend a few days in this area, where the holidays have already begun. Mr Cordier deserves the heart-felt gratitude of the Council of Europe for having organised today's events so energetically and thoroughly. I would also like to welcome members of the courts in Bordeaux who are taking part in this opening session, the trainee judges from the Ecole, professors of the Faculty of Law, and finally the participants from our member States and the observers.

3. Today's Colloquy was organised, like the previous ones, to allow specialists to discuss freely and openly a problem of current concern to several member States, and of direct concern to the Council of Europe itself and which it has begun to study. The aim of these Colloquies is above all to allow participants to exchange information on the way they look at a problem in their country, and how they propose to tackle it. It is fundamental to the Council of Europe's policy of harmonising and aligning legislation, that specialists should be able to meet, preferably before work on the proposed legislation has begun. This can lead to a process of "gentle harmonisation", with obvious benefits, since each national legislative authority can bear in mind what it knows about proposed legislation in other member States. This preliminary harmonisation is something that the Council of Europe often uses alongside retrospective harmonisation which may, for example, arise from adopting international conventions. The Council of Europe has already done a considerable amount of such work.

4. The theme of today's Colloquy, "Judicial power and public liability for judicial acts", is intended to highlight various aspects of the question under consideration.

The main problem is one of liability, which continues previous work carried out in this field (eg conventions on the liability of producers and motorists). From harmonisation of the rules governing civil liability, the Council of Europe has moved on to the question of public liability, which was the subject of a first recommendation adopted recently, dealing principally with the State's liability for administrative acts. In the course of this work, it rapidly became clear that judicial acts should be taken out of the purview of the recommendation and dealt with separately. Admittedly, the aim of compensating people who may have suffered harm as a result of a judicial act seems worthy of consideration by the Council of Europe since one of its primary concerns is the protection of the individual in the widest possible sense. However, the formulation of legal rules governing public liability for judicial acts calls for the utmost care so as not to upset the administration of justice by the courts, which constitute one of the essential rules in the European democracies. This, too, is something that the Council of Europe is required under its Statute to defend and promote, because it is closely linked to the principle of the rule of law and the fundamental freedoms.

This is the question before us today. To what extent can we accept the idea that a judge is not infallible, without interfering with the essential independence of the judge in our democratic societies? Because this question is so fundamental we have asked our first Rapporteur, Mr L Blom-Cooper, to describe the concept of the independence of the judiciary as it is currently understood in the United Kingdom. Mr Blom-Cooper's description of British ideas of independence is in my view very balanced and differentiated and shows considerable understanding of the advantages, even for the judiciary, of a system which does not guarantee total immunity to a judge who has shown that he is incompetent to carry out his duties. As Mr Blom-Cooper very rightly observes in his report, respect for the judiciary can only be enhanced if public opinion is able to see that judges are not treated as if they lived in an ivory tower ... This is a very serious and topical issue which in my view should not be sidestepped in a Colloquy of this nature.

5. Having admitted that certain court decisions may give rise to a right to compensation, we must state very carefully the cases in which this can occur. This is far from being a simple task, as Professor Kübler's report on the role of the judge in a changing society demonstrates. Even if we imagine that it ever corresponded to reality, Montesquieu's idea of the judiciary where the judge is "the mouthpiece of the law" and the judiciary merely an "empty power" - certainly cannot do justice to the extreme complexity of the tasks that a judge today has to undertake. The law which it is his duty to administer has suffered runaway inflation, the number of texts has shot up, and it is often difficult to establish their importance in relation to each other. Furthermore, the law has entered new fields which are often highly technical and developing extremely rapidly. In the past a judge was perhaps able to collect his thoughts in the silence of his office - which was undoubtedly less full of files than it is today. Now he works constantly in the public view. Court news, both on television and in the papers, is very much in demand and excites enormous public interest, which makes it difficult for the judge to preserve the equanimity which is essential for

his work. It is equally difficult for a judge to remain entirely deaf to the constant public debate on the current state of the law. Judges are urged on all sides to be realistic and take account of social developments, but to what extent should they do this if they are to give good judgments? There are many questions, and I shall do no more than mention them to the European judges present here today who have certainly had to consider them daily.

6. Even the activities of international organisations like the Council of Europe or the United Nations tend to make the judge's work even more difficult, by laying down international rules of which the judge is deemed to be aware in order to incorporate them in his decisions. The first part of the report to be presented by Mr Velu, Advocate General, is very eloquent on this point, particularly on the effect of the European Convention on Human Rights on the law of member States.

7. In view of this situation, it is only normal that most member States should have laid down very clearly in their law, the protection to which a judge should be entitled when it appears not only that harm has been caused by his act, but that this harm can - exceptionally - be directly attributed to his personal fault. Mr Morozzo della Rocca will compare the ways in which this problem has been dealt with in English, French, German, Spanish and Italian law.

8. Mr Velu kindly agreed to attempt a definition of the essential requirements of any provisions governing public liability. Mr Charlier, who has directed the work already done in the Council of Europe, accompanied Mr Velu's full, wide-ranging and detailed report with a note on the ideas on which the work was based.

9. Faced with such rich and varied materials, the Rapporteur General's task will as usual be very difficult and our particular thanks are due to Professor Agostini for having agreed to undertake it. I have no doubt that the proceedings of the Colloquy will be extremely interesting and I am quite sure that it will enable the Council of Europe to complete its work in this very sensitive field of public liability for judicial acts.

ADDRESS

by

Mr Pierre LYON-CAEN, Chargé de Mission
Representing the French Minister of Justice

I should like first of all to thank you, on behalf of the Minister of Justice, for the honour which the Council of Europe bestowed on France in choosing Bordeaux as the venue for its 15th Colloquy on European Law.

The Minister had hoped to be here in person to welcome you: but the volume of business at the close of this parliamentary session has prevented him from coming. He has asked me to convey his sincerest apologies to you.

The work of the Council of Europe in legal affairs is of considerable importance in two ways: it fosters a knowledge of the institutions of the European States, and helps to improve those institutions, not least through the medium of recommendations. The Colloquies on European law are always the crowning event of this activity, and we are particularly proud to think that this Colloquy, taking place in Bordeaux, may well be an important milestone.

May I add that, to any French lawyer, there is symbolic significance in an international colloquy meeting to discuss, among other topics, "the independence of the judiciary" in a town belonging to a region that cherishes the memory of the man on whom so much of our thinking about justice and its place in the political scene is modelled: I refer, of course, to Montesquieu.

1. THE SEPARATION OF POWERS: INTERPRETATIONS

The theory of the "separation of powers" is certainly the first systematic approach to the question of the role of the judiciary and its place in State institutions.

It is paradoxical, then, as well as being a tribute to the broad scope of Montesquieu's research, that his theories should have lent themselves to so many strikingly different interpretations, and been put into practice by States in such dissimilar ways.

As we all know, the Constitution of the United States of 17 September 1787, refers expressly to three separate powers, one of which is the judicial Power (Article III, section I).

Less than two years later, on 26 August 1789, the Declaration of the Rights of Man and of the Citizen was proclaimed in France, with the solemn affirmation in Article 16 that

"Any society in which no provision is made for guaranteeing ..... the separation of powers, has no Constitution".

This Declaration prefaced the Constitution of 3 September 1791, the first in the history of France, Part III of which establishes the existence of the judicial power.

But the same words cover different political and legal realities.

In the Constitution of the United States, the judicial power is seen chiefly as a bulwark against arbitrary rule.

The French, for their part, could not forget after the Revolution that in opposing the application of the royal enactments - the laws, that is - the courts of the Ancien Régime hampered attempts to transform the monarchy. It therefore saw the judicial power as a possible obstacle to the process of adapting the law to changes in the social system. As you see, the theme of "the role of the judge in a changing society" is not new .....

Thus history has engendered two "readings" of Montesquieu simultaneously. According to the American reading, the "judicial power" may oppose the legislature and the executive, for both of these are liable to be corrupted by the arbitrary exercise of power.

In the French reading, the "judicial power" may not oppose the legislature or the executive - although I shall qualify that statement slightly in a moment. The conceptions prevalent in France in the revolutionary years were moreover so categorical that, for a short period, judges were denied the power of interpreting the law and were required to refer any question of interpretation to the legislature in the form of a "référé législatif".

These excesses were short-lived.

But ever since that time, the French system of justice has borne the imprint of two characteristics where its relations with the other institutions are concerned:

a. Judges must abide by the law and not interfere with its application in the name of higher principles: in other words, judges have no power to verify the laws' conformity with the Constitution: since 1958 such a control has been entrusted to the French Constitutional Council whose decisions are binding on the courts at both levels, despite the lack of any procedural links; but the judges are required to render decisions even when the law is silent, obscure or incomplete (Article 4 of the Civil Code) for otherwise there is denial of justice. Since the law does not constitute a coherent corpus, but is composed of successive strata not all of which are inspired by the same philosophy, the judge's power to interpret the law does provide him with a margin of discretion that is by no means negligible: for although the judge may not oppose or infringe the law, he may take it upon himself to remedy its shortcomings. One jurist has even said about judges that it is they who legislate for particular cases.

b. Nor may judges monitor the working of the public administration, whether on the ground of legality or on that of liability; on this latter point we know that the development of the French institutions led to the appearance of administrative courts with competence in administrative disputes involving issues of legality and liability. These courts are in quite a separate category from the ordinary or judicial courts. Thus the exercise of administrative power is subject to judicial control.

Furthermore, competence is restored to the "ordinary" court judge in the event of administrative power being such as to constitute a "voie de fait". Furthermore, his grossly abused role in criminal proceedings may cause him to oppose the desires of the Executive; so that if he is to accomplish his assignment fully, he will have to enjoy as great a measure of freedom as possible, in particular with regard to the Executive.

Be that as it may, the twofold principle that the judge may not take liberties with the law or involve himself in the activity of the administration, is fundamental to the organisation of the public authorities in France.

These two characteristics are clearly expressed in the provisions of the Act of 16-24 August 1790, still partly in force, which is fundamental to the organisation of the judiciary.

Jurists tend to maintain that this Act enshrines the principle of "separation of administrative and judicial authority", suggesting by their choice of words that this is a corollary of the "separation of powers".

But in so far as it is a corollary of the separation of powers it is quite specifically French. Any such corollary would be unthinkable in the United States.

Since the Revolution, our constitutional history has not generated any overall reappraisal of the initial principles. The use of the words "pouvoir judiciaire" in constitutional texts is highly exceptional since it occurs only in the Constitutions of Year III and of 1848.

II. JUDICIAL AUTHORITY AND INDEPENDENCE

There are those who say that when the 1958 Constitution was framed, the choice of the term autorité judiciaire reflected a concern to make the description of the judiciary reflect more closely its actual characteristics; the concept of judicial power was, according to this theory, to be reserved for a judiciary organised on the American model.

I do not know whether I interpret the thinking of the Constitution's authors correctly.

But the fundamental issue is not one of words; what appears to be of paramount importance in the 1958 Constitution where the place of the judiciary is concerned, is the fact that it expressly and solemnly enshrines two principles:

- the independence of the judiciary (Article 64);
- the duty of the judiciary to safeguard individual freedom (Article 66).

Although it has been quite widely accepted since the 19th century that these two principles govern our system of justice, they were evolved from particular provisions. They were not formulated so coherently in the text of the Constitution until 1958: the 1946 Constitution simply contained an allusion to the independence of the judiciary.

This formal sanction is of more than just literary interest, for the case-law of the Constitutional Council has made its impact tangible.

The Constitutional Council has on more than one occasion declared an item of legislation unconstitutional on the ground that it infringes one or other principle, either the independence of the judiciary or its duty to safeguard individual freedom. These are principles of positive law with tangible impact, and the Legislature and Executive are both obliged to abide by them.

Furthermore, in a celebrated decision of 22 July 1980, the Constitutional Council made it very clear that independence was a constitutional provision designed to protect not only the ordinary courts but also the administrative courts.

I hasten to add that there have been many practical applications of this principle, both with regard to the status of the courts where their administration and their decisions are concerned, and with regard to their members' status.

I do not propose to dwell on these points, because there will be ample opportunity to explore them more fully in the course of the Colloquy.

But I would like to say a word here about the major systems that co-exist in Europe, and pay special tribute to the ones I know quite well which seem expressly designed to protect the judge against incursions on the part of the Executive.

A clear distinction must be drawn between the common law countries and the Latin countries.

In the countries where the courts adhere to the Anglo-Saxon tradition, judges are recruited after an initial period of professional experience, and appointed to positions which they will hold right up to the end of their professional lives, as this is seen as a means of ensuring their independence. The judge here embodies the concept of irremovability, taken to the extreme.

In the Latin countries, most judges are recruited straight from university. These judges, or magistrates, start young and make their careers in the judicial profession.

The independence of the judiciary is then ensured by organs theoretically separate from the Executive, which manage the judicial profession and preside over the promotion of judges.

The Supreme Council of the Magistrature, in Italy, is a perfect example of such an autonomous body. It is composed of magistrates elected by their peers, and its terms of reference even entitle it to give an opinion on the budget of the Ministry of Justice.

On achieving democracy, Spain and Portugal immediately set up administrative bodies on the model of the Italian Supreme Council.

In Spain, the system whereby the General Council of the Judiciary was composed of magistrates elected by their peers was recently reformed. Appointments to the General Council are not now made by judges but by members of parliament. The purpose of this change is to replace a corporatist system by an election that reflects the national sensitivity more closely.

Portugal also has a Council elected by the judges to ensure independent administration of the judiciary.

In France, there is also a Supreme Council: the Conseil Supérieur de la Magistrature which was set up in 1946 and modified considerably in 1958. Its role in safeguarding the freedom of judges in the exercise of their duties may in fact be greater than its legal prerogatives suggest. But the way in which power is shared between the presiding judges, the Minister and his staff, a so-called promotions panel consisting of judges, some elected and others ex officio, and the Supreme Council, is complex in the extreme.

Few people regard this assemblage as particularly satisfactory: no sooner had the Minister of Justice appointed a Commission in 1982 to look into possible reforms of the status of the judiciary, than a very widespread consensus came to light among all the judges consulted over the principle of a reform. Unfortunately, none of the proposals and suggestions formulated by the Commission enlisted the agreement of a majority of judges, for although there is a majority in favour of reform, no one scheme has the support of all.

A reform of the status of the judiciary and of its Supreme Council is therefore still pending in France.

The proceedings of this colloquy, the comparisons you draw between your countries' institutions and any endeavours made by the Council of Europe to harmonise these more closely, should be of valuable assistance to us, and may I say here and now how grateful we are.

Before concluding, I should just like to discuss very briefly one further aspect which the proceedings of your colloquy will cover, namely liability.

III. FORCE OF LAW AND LIABILITY

One of the most significant signs of the "authority" or "power" of the judiciary is the "force of law" that attaches by tradition to court decisions. According to the conventional view, these decisions have the force of law from the moment they are recognised as being final, and command respect as though they were law.

This explains why the idea of liability being imposed on the authority responsible for the administration of justice is sometimes so hard to accept. For if a final judicial decision has the force of law, then presumably it follows that that decision is above suspicion and beyond reproach: it would be out of place to suggest that it might be unauthorised or to criticise it for any damage it might cause. And by extension, any decisions taken and

operations accomplished in the course of the administration of justice, that are distinct from judicial decisions in the strict sense, are likewise seen as being above suspicion and beyond reproach.

Thus the end result is to render the authority exempt, or virtually exempt, from liability in the administration of justice.

This situation can be averted in two ways.

The first is to draw a distinction between court decisions in the strict sense and any other decisions or operations required for the administration of justice, and to confer the "force of law" and its implications only on the former.

The second is to consider that the question of liability may be settled without bringing any appraisal to bear on the rightness or wrongness of a court decision. This amounts to deciding whether the judiciary can incur liability without fault.

French case-law and legislation have developed in both of these directions, in conditions which will be discussed more fully as the Colloquy proceeds.

But I must still allude, in a concluding remark, to the personal liability of the judge and the manner in which his judgement is shaped. When the judge's action - or the lack of it - results in "social" damage for which no private individual will seek compensation, how can his liability be incurred without the risk of jeopardising the necessary independence of the judiciary that I mentioned earlier?

These are some of the numerous questions that you are going to debate in the course of the next three days.

There is one which dominates all the others and which the present Minister of Justice, Robert Badinter, recalled recently in Rome when addressing the Supreme Council of the Italian Judiciary on the occasion of that institution's anniversary ceremony: "There is no democracy without freedom, and there is no way of ensuring freedom, for the individual or the public, without the guarantee of an independent, high-powered and respected judiciary".

It is for the governments to provide the judiciary with all the resources it needs to shake off any pressures that may be exerted upon it, and for the judges to be alert to the feelings of their fellow citizens and so take the right decisions and earn the respect to which their office entitles them.

ADDRESS

by

Mr Raymond EXERTIER
Director of the Ecole Nationale de la Magistrature

Ladies and gentlemen,

It is a very great honour for the Ecole Nationale de la Magistrature to welcome you today and to assist in ensuring the success of the 15th Colloquy on European Law.

It is a very great honour for the Ecole and it is also something that interests us keenly. How could it be otherwise for an institution that feels, and desires, a direct involvement in European law and its development, and often finds itself at the centre of meetings of European jurists.

You are going to spend three days in the Ecole, among its teachers and its students, known as 'auditeurs de justice', some of whom will be attending your working sessions. Allow me to give you a brief description of the Ecole and to explain its aims. No doubt it will then be easier for you to appreciate the interest it takes in your presence.

The Ecole Nationale de la Magistrature was founded more than a quarter of a century ago, although the building where we are now was not opened until 1972. It was built on the site of a prison, the former Fort du Hâ, the only remains of which are the two towers overlooking the garden. One of these towers has particularly sinister associations, since during the last war, its thick walls echoed with the cries wrung from the victims of torture.

It is not insignificant that a school for the judiciary should have been built in a place where human rights were flouted. This is more than a symbol; it must be seen as a continual and insistent warning to learn constant respect, without concessions, for the fundamental values which the judiciary must defend in a society based on law.

In the Ecole we provide the initial training for the judiciary; over a two-year period in which tuition alternates with practical experience in the French courts. We receive new students each year. The 1985 intake, whom you will meet, numbers 223 "auditeurs", who will assume their first judicial duties in January 1987.

But the Ecole Nationale de la Magistrature also carries out in-service training for serving members of the judiciary, through introductory and refresher courses, seminars, national sessions, usually in its Paris building, and also regional sessions. Each year more than 2,000 persons, representing every function and every rank in the judiciary, take part in this training, a figure which represents more than a third of the whole body. It is true that in addition to voluntary in-service training, open to all members of the judiciary, we have an unusual system of compulsory in-service

training: during the first eight years in office everyone graduating from the Ecole to the judiciary must follow training courses totalling four months.

There is also an international section which carries out both initial and in-service training of French-language members of foreign judiciaries.

Europe has its place in all three of these sectors.

During initial training, first of all, every "auditeur de justice" follows a compulsory course on Community Law and the Convention on Human Rights. Tuition in professional practice, particularly that relating to criminal law, covers the case law of the European Court of Human Rights. European law is a regular subject for study and research. A group in the 1984 intake is preparing a substantial report on the Human Rights Convention.

As part of its in-service training the Ecole Nationale de la Magistrature regularly holds in Paris a national session on European institutions and another on human rights. As many of you already know, practical courses take place every year: in Strasbourg, at the Council of Europe and the European Court of Human Rights; in Luxembourg, at the Court of Justice of the European Communities; and in Brussels, at the Commission of the European Communities.

The international section of the Ecole holds numerous practical courses in the French courts for members of the judiciary from Council of Europe States. In 1985 they have come from Britain, Finland, Greece, Italy and Germany.

I hope I have convinced you, if you were not already convinced, that the Ecole Nationale de la Magistrature is not unfamiliar with the issues which concern you.

On this point, however, I would particularly like to emphasise how close the themes chosen for this Colloquy by your eminent experts are to our current subjects for thought:

- independence, of course, because the Ecole, as an autonomous public body with a board chaired by the first President of the Court of Cassation, has always regarded itself as a school of independence and preparation for independence, and this is possible only if it remains itself a place of freedom;

- the personal liability of the judge - who is not infallible - because this is as it were a related question and because the Ecole is at present giving attention to Article 24 of its internal regulations, which states that tuition is to cover the main functions of the judiciary, its code of ethics and its professional responsibilities;

- the role of the judge in a changing society, because the Ecole is directly confronted with this difficult problem. Indeed, in a few days' time I shall be submitting to our Board a closely related subject for annual study, namely mastering the volume of court business, a theme which immediately raises the question of the judge's functions.

Ladies and gentlemen,

Here you are at home, very special guests, of the Ecole Nationale de la Magistrature, which is both your servant and your listener, to learn from you what it must afterwards teach.

INDEPENDENCE OF THE JUDICIARY

by

Mr L BLOM-COOPER
Queen's Counsel (London)

When, recently, Mr Clive Ponting, a senior civil servant in the United Kingdom Ministry of Defence, publicly released, without authorisation from his superiors, secret information about the United Kingdom Government's response in Parliament to searching questions on the sighting and sinking of the Argentinian vessel, The Belgrano, by the Falkland Islands Task Force in May 1981, and was prosecuted under the Official Secrets Act 1911 for his act of disloyalty and breach of his official duties, there was publicly perceived a direct confrontation between the politicians and the judiciary. And when the trial judge, Mr Justice McCowan, ruled that the "interests of the State" (the phrase used in Section 2 of the Act) meant the interests of the government of the day, that feeling was compounded by a serious suggestion (however unjustified in actuality) from many members of the public that the judge was merely doing the bidding of the United Kingdom Government. Indeed the judge was castigated by no less an august journal than The Times, which is currently a supporter of the Government. Had the jury not acquitted Mr Ponting, thereby rejecting the judge's direction to them, in effect, to convict, the suggestion of politically-influenced compromise by a High Court Judge would have been the more voluble and sustained: so much, it would be claimed, for the independence of the judiciary.

The reverberations of the Ponting affair disclose in an acute form the continuing debate about the reality of judicial independence. The independence of the judiciary is not a one-sided concept. Judges value their detachment from political and social policy, a posture that is acknowledged constitutionally and is supported by legislative and conventional rules. Politicians, on the other hand, are necessarily in a hurry to advance their policies by all means at their disposal. It is only their acceptance, in word and deed, of the judicial component in government (used in its widest sense) that leads to political forebearance of either direct or indirect interference with the judicial process. To appreciate the judicial and political attitudes to that process, one needs to examine the express and implied provisions that seek to sustain the independence of the judiciary from the executive and administrative processes of Government, and to study the self-denying ordinance of politicians who might wish to see judicial support for governmental policies and decisions.

The term "independence of the judiciary" carries two meanings: the independence of individual judges in the exercise of their judicial functions, and the independence of the judiciary as a body. The former is composed of two elements - (a) in the process of decision-making and in exercising their incidental official duties, they owe allegiance to the law and to no other authority; and (b) that their term of office and tenure are adequately secured. Interference with the independence of individual judges is regarded as highly reprehensible. Interference with the independence of the judiciary as a body has additionally an impact on

individual judges in the discharge of their duties. The traditions and corporate responsibility which the institution of the judiciary inspires in the individual judges reinforce their individual independence. The resistance of the judiciary to governmental incursions upon that discrete function in the administration of justice is as crucial to judges as is their detachment from political considerations of the individual decision-making process.

The primary provision designed to secure the independence of judges in both senses is judicial tenure. Historically in England Parliament was less motivated by a commitment to judicial independence than by the political considerations of curbing the powers of the Sovereign. Whether the motive the legislation had in establishing the judicial oath, which provided that judges should swear that they need not receive any fee or present from any party to a case before the courts, except from the Sovereign who paid their salaries, played a vital role in both improving judicial standards as well as reducing the influence of the Sovereign over the judges and the judicial process.

Ultimately in the second half of the 17th century the judges were decreed by the Act of Settlement in 1688 to hold office "quamdiu se bene gesserit". Apart from the power of removal from office by resolution of both Houses of Parliament, which has not occurred in modern times, the judges of the High Court are quasi-irremovable. Although the judges of the two lower rungs of the judicial ladder - the Crown Court judges and the Magistracy - are removable in certain legislatively defined circumstances, there is still a high degree of security of tenure. Since the lower judiciary, in general, functions subject to the control and supervision of the higher judiciary, there is less need for quasi-irremovability of the former.

The method of appointing judges to judicial office is seen as an important factor in ensuring and then maintaining a sense of, if not actual, independence. Seen in the sweep of history the movement in all civilised legal systems to professionalise the judiciary, although not in itself anti-democratic, was more akin to a view of democracy that denied populism or accountability to the electorate. It reflected a rule by the liberal aristocracy of talent, not by the voter. In his generally eulogistic work on the American Commonwealth, the English historian, James Boyce, did not disguise his outright hostility of an elected judiciary. Consciously or not, in the long run, utilitarianism and intellectual elitism were to provide in England a bulwark against any pure democracy. The quintessential democrat expects judges, like politicians, either to be elected for office or, after executive appointment, to be exposed to electoral confirmation, or at least to be responsive to the whims of the party.

The inelegance, not to say impropriety, of electing judges to office can best be seen in the United States. Recently the Governor of California has urged a special interest group to "work for the defeat" of Chief Justice Rose Elizabeth Bird and three other justices of the California Supreme Court, because of the particular economic interests of the group. This attempted politicising of the Court has met with vigorous dissent from informed commentators of the judicial scene. It has led to the understandable clamour that if judicial independence is worth preserving, it is necessary to consider giving the same lifetime appointments to the judges of State Courts as is provided for judges in the Federal System. If Federal

appointments are strictly controlled by the President and Congressional Committee (and might be expected to reflect presidential political philosophy during the President's limited term of office) irremovability after appointment has not ensured compliance with the presidential preferment and does not jeopardise future independence. But the complete lack of accountability of the Federal Judiciary is not so readily sustainable. The term of office for a judge of the Supreme Court of California is 12 years, without having initially to undergo the careful sanctioning of the Federal Judiciary. Since the State judges are not subject to scrupulous confirmation at the time of appointment of Federal judges, the claim is that State judges may not turn out to be competent. Elections after 12 years of incompetent judges may be a reasonable way of keeping those judges constantly responsible to the public whom they serve when acting judicially.

If a judiciary is in practice unaccountable to Parliament and if judges are not removable by the electoral process at any time until compulsory retirement age, it is little wonder that from time to time politicians will publicly oppose judicial decisions. Such public discord between politician and judiciary will, if repeated with any frequency, serve only to weaken public regard for its judges. And whatever the reality of judicial independence, the public perception will be of a judiciary out of accord with established social and political norms. Instead of judges appearing as upholders of the law as part of the process of stable government, they will be seen as disrupters of the social order. The delicate balance produced by acceptance of the rule of law for all arms of government will be disturbed to the point of political and social disequilibrium.

The method of dealing with judicial incompetence, thus avoiding a process of electoral removal, is to operate a system of promotion for the competent judge, and to deny advancement in judicial career for the incompetent. If numbers of the judicature in England enjoy a high social standing and the respect of the public, the same is true of their counterparts in Western Europe. Europeans share a culture that accords optimal recognition of the worth of the courts of law. At that point the resemblance between the English and the Continental judiciaries parts company. The traditional, and generally still the prevailing, view in England is that there is no system of promotion of judges in England. A legally-qualified person in England, on leaving university and qualifying professionally, usually says to himself that he will practise at the Bar and leave it to providence to determine whether after a quarter of a century in private practice he may catch the Lord Chancellor's eye and be elevated to the Bench. Once on the Bench he must reckon, Lord Denning observed in 1955 "that he will stay in that position always. He has taken it on as his life work and must stand by it. This is the same whether he be a High Court Judge or a County Court Judge (since 1971, a Circuit Judge) or a Stipendary Magistrate". A decade later Lord Scarman echoed that sentiment when he opined that judges do not hope for promotion: "Judicial office is the apex of legal career". Nothing appears to have changed during this century, since Professor C K Ensor wrote in 1933 that "a judge, at whatever level, does not look for promotion, but takes his job .... as something final, an apex, not a ladder".

Judicial promotion in England is viewed as being inconsistent with judicial independence Decisions by a judge are said to be influenced by the expectation that those favourable to government will induce official preferment. English pragmatism has not, however, meant rigid adherence to that philosophy. With the increasing size of the higher judiciary, High Court

Judges do look to promotion to the Court of Appeal, which in recent years has included an increased salary, and even to the House of Lords, which involves the accolade of a peerage and potential engagement in the deliberative and legislative functions of the upper House of Parliament. Likewise there have been occasional promotions of Circuit judges to the High Court Bench and of Stipendary Magistrates to the Circuit Bench. Since very few appointments to the judiciary occur before the age of 40 and most do not occur until between 50 and 55, the English have declined to adopt a system of a career judiciary.

Judges in European countries form a distinct profession, and a single one. The law graduate determines at the outset of his career whether he will practise at the Bar or become a judge. The two parts of the legal profession present distinct choices, at least from the age of about 25. The judiciary in France, as originally mapped out by Napoleon, received the ultimate compliment of imitation, in varying degrees, in almost every country of Europe.

The judicial profession in France is termed the Magistrature; and the generic term for its members is Magistrates (it is the equivalent to the English term "judge", though in actual range of employment it is wider). The young aspirant must comply with four conditions: (1) he must obtain the university degree of licencié en droit, a pass degree in law; (2) serve a period of apprenticeship of practical training in the courts and in the methods of administration of justice, un stage d'avocat; (3) pass a qualifying examination, an examen d'aptitude; and (4) attain the age of 25. His appointment to a post in the Magistrature then rests with the Ministry of Justice, under whose auspices all the affairs of the judicial hierarchy are regulated.

Here again there is a stark difference with the English judiciary. An English judge would cavil at any suggestion that he was a civil servant, though no doubt he would concede, perhaps grudgingly, that he is a public servant. The English judge looks to the Lord Chancellor as head of the judiciary as the protector of judicial independence both in and out of Parliament. And the administrators of the courts are part of the staff of the Lord Chancellor's Department.

While all magistrates are judges and virtually all judges are magistrates, all magistrates are not doing judicial work during the whole of their careers. The Magistrature performs two other functions interchangeably with sitting on the Bench. It staffs in addition the Ministry of Justice and the parquets. Every position in the Ministry corresponding to what in the United Kingdom Civil Service would be positions held by the generalist and specialist administrative class is held by a magistrate, and ranks in the official table of promotion as equal to some position on the Bench. The same is true of the parquets. In England, judges' salaries are now generally linked to the higher Civil Services, but in no other respect is there any comparable link.

Theoretically the European systems would indicate a direct association between the Executive and the Judiciary that belies independence. In practice, there is no evidence that the French judge is any the less independent than his individual counterpart in England; and the judiciary (the Magistrature) is no more interfered with than it is in England. Indeed in one sense the theoretically sharp division in England is often judged by the use to which the Executive calls upon members of the judiciary to

perform extra-judicial duties, such as chairing inquiries into thorny, even intractable political issues. Recently there has been much perturbation over the use of a Law Lord to chair the Securities Commission to supervise the workings of the Security Services of the Government. Judges are frequently used to preside over Royal Commissions and Departmental Committees on social and politico-legal topics. In both systems there is potential for compromising judicial independence; in neither is there evidence that judicial decision-making is other than an exercise of the essentially judicial function. In both systems there are occasions when public comment suggests that judges either do, or ought to, conform to the interests of particular groups in society. There is little to suggest that politicians ever do induce a feeling that judges must interpret and adjudicate the law as they see it. Some parliamentary utterances from Labour politicians about the way the courts have decided cases in the field of industrial law are politically motivated. But to the extent that left-wing politicians have expressed hostility towards the judiciary, trade unions have not fared at all badly at the hands of the courts, and occasionally the judges - usually on extra-judicial occasions - have responded to such political criticism.

Returning to the issue of judicial promotion, one notes the extensive scale of promotions for the rank and file of the French Magistrature. Originally there were no fewer than twelve grades, from the Juge Suppléant (the Young Supplementary Judge called on to assist temporarily either on the Bench or in the parquet) at the bottom of the ladder, to the top positions as president of a chamber of a Court of Appeal. Beyond those grades are the exalted posts, such as the President and Procureur of a Tribunal, the First Presidents and Procureurs-Généraux of the Courts of Appeal, and the judges of the Cour de Cassation and the Conseil d'Etat.

By sharp contrast with the English judge, the French judge when first appointed is a person with his feet firmly set on the lowest rungs of the ladder, to whom promotion is the breath of his professional life. Furthermore, whereas the English judge sits continually as a judge in a court of law, a French judge will almost certainly on his upward path spend considerable periods as a civil servant in a governmental department (usually the Ministry of Justice) or in the parquets of the various courts. Indeed promotion comes more swiftly to those who move between the two branches of the profession than to those who remain on the Bench throughout their career.

The pronounced promotional system has two distinct advantages. It ensures that the ablest of the Magistrature alone reach the upper rungs of the judicial ladder, whereas an incompetent High Court Judge in England is carried as a passenger in the judicial system and cannot be off-loaded. The second advantage is that the French judge acquires a broader perspective of administrative justice; in particular he is acutely aware of the machinery of government, so useful in deciding cases in the field of public law. In England too often decisions in the courts, where the citizen is challenging a ministerial or departmental act, disclose a lack of understanding of the administrative process of government departments.

Whatever the rival merits of the promotional and non-promotional systems, there is nothing in either system to suggest that judges do other than interpret and adjudicate according to the law. Independent thought or action appears to be the product of the characteristics of the office of judge rather than of the structure of judicial and administrative institutions.

The sensitivity of the English system toward any supposed interference with judicial independence is reflected in a peculiar role of English law. It is generally accepted throughout all civilised legal systems that in the interests of the administration of justice defamatory statements uttered in the course of judicial proceedings ought to be considered as published on a privileged occasion. The extent of the privilege, however, in most systems is not subject to the same degree of immunity. It is the policy of the law to impose no unnecessary fetters upon the freedom of judges and magistrates to comment upon all cases brought judicially before them, and upon the conduct of all persons concerned in those cases. But the privilege accorded to judges under English law is absolute and not qualified. Where the judge pronounces from the Bench maliciously, that is where he is actuated by a dishonest or improper motive, the absolute privilege should be inapplicable.

Both the qualified and absolute privilege is founded on the importance of judicial independence to the pursuit of truth and the administration of justice. An aspect of independence is the fear that any proceedings against a judge will diminish respect for the individual judge and reflect adversely on the judiciary if he were to be put on trial. Those systems that opt for a qualified privilege countenance the same need to protect the reputation of litigants and others damaged by judicial utterances. The balance that needs to be struck is between the unfettered administration of justice and the need to protect the individual's reputation. The right of the public to have the independence of judges preserved is hardly likely to be diminished by the exceptional case where the judge is proved to have been malicious. The denial of English law to provide the slightest chink in the armoury of immunity from suit discloses an unawareness that it is judicial incompetence that would be exposed to review in the courts and would have no real impact on judicial independence. The claim that judicial independence would be impaired, however slightly, seems unconvincing. It would not seriously be weakened by the possibility of a qualified, "good-faith" immunity. Indeed, respect for the judiciary would be enhanced, once the public could see that judges could not be treated as living in an ivory tower. If judges can properly be subject to public criticism in the media, there is little virtue in sealing them off from outrageous conduct on the Bench by denying to the victim of gross judicial impropriety some legal remedy.

What mechanisms, other than the formal provisions relating to appointment, judicial structure and removal, exist to ensure some informal public accountability which may or may not impair judicial independence. There are four mechanisms for potentially monitoring and checking judges - Parliament, the Press, the Appellate Court System and the Bar.

Parliament

As a general rule the conduct of judges cannot be discussed in Parliament unless upon a substantive motion which admits of a distinct vote of the House. Likewise, matters that are currently proceeding in the courts are sub judice and cannot be debated in Parliament until they are concluded. With regards to motions calling in question the conduct of a judge, the principle has been established that unless there is a strong prima facie case against the judge and unless the charge, if proved, would warrant an address for removal, Parliament will not interfere. Given these principles, Parliament eschews any disciplinary functions over the judges short of actual removal by an address; it does not pursue a course that would lead to censure, criticism or

condemnation of judicial conduct. But there are not infrequent occasions when in practice Parliament does censure, criticise or condemn a judge in the course of parliamentary debate upon motions for resolutions criticising judicial conduct or a judicial decision. But Parliament on the whole forbears to interfere, for fear of seeming to impair the concept of judicial independence. Lord Hailsham, the Lord Chancellor, has in recent years expressed the fear that the conventional self-denying ordinance by parliamentarians is in danger of being abandoned by a rash of critical observations by certain politicians. The preferred means of dealing with judges who deviate from the accepted norms of judicial behaviour is for the Lord Chancellor to administer a rebuke privately. He may even ask the judge to resign from office or in the case of the lower judiciary exercise the statutory power of removal. Judicial decisions which disclose a lack of observance of adherence to the judicial oath are normally left to the appellate process. Trial judges not infrequently are censured by the Court of Appeal; and on occasions appeal court judges suffer public criticism from the pronouncements of the Law Lords sitting in the House of Lords in their judicial capacity. Politically unpalatable decisions of the court of last instance are dealt with in the legislative process. English judges who have no ostensible constitutional power to nullify legislation, loyally respect the sovereign law-making power of Parliament and do not regard any legislation as impinging upon judicial independence. In at least one instance in modern times there were loud protests from the judiciary. In Burmah Oil Company v Lord Advocate (1965) A.C. 75, the House of Lords by a bare majority decided that the Government was bound to compensate the Burmah Oil Company for the destruction of its oil installations at Rangoon in 1941 by the British armed forces to deny the oncoming Japanese army in Burma the benefit of a major weapon of war. The War Damage Act 1965 reversed that decision retrospectively so as to deny the Burmah Oil Company the fruits of its successful litigation. It was one thing to change the law prospectively; it was claimed that wholly to negative a Court ruling went beyond the bounds of governmental propriety. But parliamentary sovereignty prevailed in a system that gives the courts no power to invalidate primary legislation.

From time to time Parliament legislates to limit the powers of the courts in a way that arouses judicial hostility short of any allegation that judicial independence is at stake. In 1961 Parliament in a Criminal Justice Act severely restricted the power of judges to imprison young adult offenders and instead made it obligatory that such offenders should only be sentenced to an indefinite period of Borstal training. While the judges obeyed the statutory edict they made plain their dislike of the provision that removed their discretionary power to sentence such offenders. The potential for friction between the judiciary and the Executive, which promoted and enforced the law, was removed in 1982.

Such an example, if multiplied, could readily provide a constitutional rift that might arouse claims that judicial independence was being impaired. But the paucity of constitutional conflict in recent times has preserved intact the concept of judicial independence.

Members of Parliament have from time to time used the device of the Parliamentary Question to criticise judges. In reply to questions, Ministers have similarly taken the opportunity for the same purpose, although on occasions they have declined to answer, on the ground that a judge cannot be criticised in Parliament except upon a substantive motion. In the last

century the device was resorted to for the purpose of removing from the Bench those judges who had become incapable of performing their duties due to physical or mental ill-health. One such instance led ultimately to the resignation of that great judge and authority on the criminal law, Sir James Fitzames Stephen. An MP frequently asked the Lord Chancellor or the Government whether they were aware that the judge was incapable of acting judicially, and what steps they intended to take. Government spokesmen consistently repudiated the suggestion of incapacity. Ultimately, after an article in The Times calling on the judge to resign and further parliamentary pressure, the response came, implying acceptance of the alleged infirmity of the judge, that the Government could not interfere with the complete independence of the judiciary; and that the only course open was a motion for the address. The Government spokesman added that he had to decline "to discuss by question and answer across the floor of the House the conduct and capacity of any one of the judges of the land". Faced with the insistent criticism in and out of Parliament, Mr Justice Stephen resigned his office. In recent times, private representations succeeded in effecting the resignation of the Lord Chief Justice Lord Widgery in 1981 before awkward questions were asked in Parliament.

The most frequent and constant source of parliamentary disquiet about judicial behaviour stems from sentences passed by judges in criminal courts. This arises from the fact that such instances more readily touch the interests of individual members of the public who on occasions of judges imposing particularly aberrant penal sanctions write in their droves to MPs and to the Lord Chancellor. It is at these moments that judicial independence is most at risk of being undermined, not so much by the activities of politicians but by the expression of public opinion. Public respect for the judiciary is rarely less than absolute; sporadically, however, such respect may be slightly and only temporarily tarnished.

The Media

While Parliament is restrained from criticising judges, short of a substantive motion to remove, no such institutional constraints exist for the media, save for that imposed by individual editors and by the constraints of space in publication. But since the media have no official authority to control the conduct of the judiciary, the force of adverse comment of a judge will be dictated by the form and nature of the coverage of judicial proceedings and the inherent strength and accuracy of media reporting. Correspondingly, the extent to which the courts retaliate against improper media coverage through the use of their contempt powers will in turn determine the relationship of the two and will ultimately reflect the preservation or diminution of judicial independence.

For there to be any semblance of an impact upon the public perception of the reality or otherwise of judicial independence, there must be some assessment of the effectiveness of the media in its treatment of judicial proceedings. It is widely believed that during this century judges have been inadequately criticised, and hence shielded from any sense of judicial impropriety, by the mere fact that the media have failed to discharge properly its duty as the fourth estate of the realm to expose the shortcomings in the administration of justice. The author of this report wrote 20 years ago that "criticism of the judiciary over the last fifty years has been confined to polite conversations over the coffee cups and to secluded professional exchanges in solicitors' offices and barristers' chambers ..... The English have cloaked their judges with an immunity from

public criticism which tends only to diminish the quality of justice administered by those so privileged" by a lack of any self-critical analysis induced by public comment. Professor W A Robson had written earlier that "in practice (serious criticism in the press) rarely takes place, and in effect the judiciary enjoys an almost complete immunity from attack.". And that arch-critic of the judiciary, Professor John Griffith, has consistently complained in his writings that "judges are treated as though they were Caesar's wives and we should be unsuspicious". In the 1980s there have developed signs that informed criticism is emerging in a way that renders those commentaries out of date. Both the earlier criticism and the emerging effectiveness of media comment may well be due to the law of contempt as it stood before and after the Contempt Act 1981. Some have claimed that the press has taken its lead from Parliament, but there seems to be no evidence that journalists feel restrained by political reticence.

Professors Abel-Smith and Stevens in their seminal work in 1967, Lawyers and the Courts, wrote that within a decade of the decision in R v Gray in 1900 - when the Editor of the Birmingham Daily Argus was held to be in contempt for describing Mr Justice Darling as an "impudent man in horsehair, a microcosm of conceit and emptyheadedness" - "the criticism of judicial behaviour which had been so outspoken was replaced in the press by almost sycophantic praise for the judges." In less picturesque language others suggested that newspapers were fearful of criticising judges for fear of being punished for contempt, and as a result were unduly cautious. The media's sense of legal power inhibiting proper criticism was manifest in the 1970s and was allayed by the 1981 Act; that justice and consequential recent judicial rejection of claims of contempt instituted by the Attorney-General have effectively removed the wraps with which the judiciary has been clothed.

Some of the diminution of public criticism in modern times has been due to a new generation of judges, less sensitive of their self-importance and more in tune with the role of modern means of communication. There is always, of course, the overlaying fact that the English are innately respectful and uncritical of their judges, also tend to be placed on a pedestal by virtue of their conferred exalted stations in British society. This factor has been augmented by the tradition that judges should not respond publicly to public opinion. This self-denying ordinance is well understood by the public, which in turn induces a sense of unfairness if criticism is one-sided and unanswered, if not unanswerable. Although there has been some relaxation of the convention that judges should not perform in the media, the Lord Chancellor has recently pronounced the edict that judges should not engage in public debate without permission from himself. If judges continue to stand aloof from public discussion of current issues not touching on their own individual actions on the Bench, it will not serve to maintain their independence but merely be a symptom of their innate conservatism and remoteness from their function in the mainstream of an evolving social and governmental policy. One cannot escape the conclusion that the defence of the judges against public criticism by the Lord Chancellor as the spokesman for the judiciary, in which the fear is expressed that "public pressure was a serious danger to judicial independence" will sound hollow to a public that increasingly demands an accountability by an institution that is unelected and in that sense anti-democratic.

Appellate review

Unelected and largely unanswerable to the body politic the English judges may be. They remain, however, subject to correction by the appellate system. No one should underestimate the role of appellate courts in curbing and correcting the misconduct of judges in trial courts. Trial judges are aware that even if the openness of court proceedings exposes them to public comment and potential rebuke, the rebuke administered by appellate judges makes a more direct impact on future judicial behaviour. The fact that the appellate courts play an important and effective role in securing high standards of judicial behaviour, over and above their function in reviewing, and if necessary, reversing judicial decisions, is itself a valuable part in maintaining public confidence in the quality of justice and the standing of the judiciary. But what is significantly of even greater importance is the fact that the appellate courts are the only institution which officially and publicly pass upon judicial misconduct and, when warranted, exercise a disciplinary function, ranging from censure or criticism to reversal of a judgment accompanied by severe condemnation of the judgment's author. While such disciplinary action stops short of affecting tenure or position of the defaulting judge (although it will almost certainly affect any potential promotion) it loudly proclaims a self-regulatory procedure dissociated from any action or influence by Parliament or, more particularly, by the Executive. If judges are prepared to exercise supervision and control over their judicial brethren, the public perception is one of sustained confidence of standards interstitially imposed and free from political interference.

Whether an appellate court reverses the judgment, quashes the conviction, reduces the sentence or varies the terms of any judgment because one or other party to the proceedings did not obtain a fair trial, the explicit or even implicit disapproval of the manner in which injustice was perpetrated, public confidence that may have been impaired by the injustice is restored. The party which suffered the injustice and the public at large might be tempted to attribute the misconduct not merely to the individual judge but to a characteristic of the judiciary as a whole. Thus recently the House of Lords in substituting a manslaughter verdict for that of murder, thus reducing a life sentence effectively to one of 3 years' imprisonment, did wonders for professional and public confidence in the administration of English criminal law. Lord Hailsham of St Marylebone, the Lord Chancellor, said: "In the end justice in this case will have been done, but in my view, at the end of any unduly long and circuitous route. It would have been done at the trial if the court and the prosecution had followed the very sensible course by the committing justices (who had refused to commit the accused for trial on a charge of murder), or accepted the very proper plea (of guilty to manslaughter) tendered on behalf of the defence. It would have been done on appeal had the court analysed correctly the true nature of the defence emerging from the evidence and noticed the fact that it had not been properly put to the jury.". Had those judicial strictures upon all involved (except three lay justices in a country town in Huntingdonshire) in the prosecution and conviction of the accused not been uttered, the palpable injustice would have aroused public disquiet about the quality of criminal justice and necessitated some alleviation by the Executive in early parole for the accused. That would undoubtedly have led to a justified feeling that the Executive was not merely a long-stop for miscarriages of justice that were due to factors other than

judicial misconduct, but had to intervene to correct judicial incompetence. The ability of the judiciary itself to head off the latter intervention by the Executive is a powerful supporter of judicial independence.

The Bar

The controlling aspect of the appellate process depends in great part upon the action of a vigilant Bar. Mr Justice Blackburn wrote in 1872 that "the only practical check on the judges is the habitual respect which they all pay to what is called the opinion of the profession.". Exaggerated as that statement may be, the Bar is an important feature of judicial control, if only it is willing to challenge judicial impropriety on appeal, as and when called for. If the Bar lies supinely under the seat of justice, judicial misconduct will go uncorrected. But that is not the only role played by the small band of advocates who appear daily in the courts. The Bar, increasingly so in England, initiates reform of the administration of justice. It observes closely the process of selection of judges, and even if it is not formally consulted about judicial appointments it communicates informally through its leading practitioners its views about the candidates for judicial preferment. Above all, through its Code of Etiquette and its disciplinary powers, it controls the standards of professional conduct. Since judges are recruited exclusively from among practising barristers, the standards of the Bar are part of the permeable standards that practitioners take with them onto the Bench.

The professional etiquette of the English Bar is very strict. Quite apart from the limitations imposed on barristers emanating from the effects of a divided legal profession, there are other limitations peculiar (in more sense than one) to the English legal system. A barrister is bound to appear in court for anyone prepared to pay a proper fee. He can refuse to accept a brief only in special circumstances, such as his commitment elsewhere or the opposing party has retained his services, either generally or specifically. The barrister cannot interview witnesses, except the client or an expert witness The rules about publicity are stringent. A barrister may not advertise his services (Solicitors have only recently been permitted to advertise). And he is not allowed to do anything that might be construed as touting for work. Furthermore, the barrister can neither negotiate for his fees - he must arrange his fees through his clerk - nor can he sue for recovery of unpaid fees.

These are only some of the more bizarre rules of a profession that is tightly knit and operates within professionally controlled bounds. Whether the rules actually are necessary in the public interest, they are seen professionally as part of a desirable cohesive force within the administration of justice. Clearly, the Bar is jealous of its traditions and high standards of conduct. These features of the tiny coterie of 4,000 practising barristers, from whose leading members are chosen the higher and, more widely, the lower judiciary, infects every aspect of the judiciary - including its avowed independence.

Training

One of the most startling characteristics of the English judicial system is the theory that on appointment to the Bench the practising barrister of 25-30 years' experience as an advocate in the courts has already acquired the prime, if not exclusive grounding for judgeship. There has not, until

very recent times, been any suggestion that a judge requires to be trained for work on the Bench. There is no judicial staff college, at which either aspirants to the Bench would be required to attend before taking up judicial office, or where judges would attend as part of in-service training. English judges are not presumed to know anything about the facts of life in society (including the public role of judges) other than those acquired in an exclusive career at the Bar or in their mostly cloistered private lives. Although there is tacit acknowledgment that the attributes of an advocate are qualitatively different from those of a judge, and vice-versa, there is no official attempt at any inculcation of judicial habits or of the processes of judicial decision-making. Such have been the publicly recognised deficiencies of knowledge of judges in the criminal courts of the ingredients of a sound and rational sentencing policy and practice that it was felt a few years ago that departure from the established tradition of having no teaching process was called for. There now exists an official Judicial Studies Board, which requires Recorders, Circuit Judges and new appointees to the High Court Bench to attend one-weekly seminars, at which practical exercises in sentencing, together with lectures from academic lawyers and criminologists, prison administrators and probation officers are purveyed. This concession to the need for instruction in the art of sentencing is not even sanctified by the title, "training". They are entitled, and regarded as "studies". This disinclination to subject its judiciary to training is a reflection of the English attitude that to inject any educative process into the judiciary by governmental edict would be somehow to jeopardise the independence of the judges. That training is manifestly not a method of indoctrination of political or other extra-judicial influences has not yet percolated through to the legal profession. Lawyers and public administrators are, unlike their European counterparts, still separate and apart - a tribute to the influence of Montesquieu.

Conclusion

No single provision of the law which may be designed to sustain the independence of the judiciary in a democratic society can conceivably have that effect. Cumulatively the various provisions no doubt have their impact upon judicial attitudes and behaviour. Some of them - such as quasi-irremovability, training and judicial control - possess a potentially greater influence than others. But can it be said that they present any kind of fulcrum to the judicial system? Is there not some other indefinable quality that compels compliance and conformity to the vigorously declaimed independence? Or is it that, when judges declare that they are not more executive-minded than the Executive, and do exercise real independence, their pronouncements are mere rhetoric? The debate is endless and swings like the pendulum at varying times. But at the heart of the issue lies the quintessential role of judges in our kinds of society as those judges perceive their role and the rest of us observe critically. No better description of the judicial function exists than in the words that Felix Frankfurter wrote as a Justice of the US Supreme Court in 1952 when he stood down from the Bench in a case involving the piped music and propaganda on the municipal buses in Washington DC, on which that great judge travelled daily in aural discomfort. He wrote pellucidly and with felicity:

"The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change a man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted."

(Public Utilities Commission of the District of Columbia v Pollak 343 U.S. 451, 466-7 (1952))

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THE ROLE OF THE JUDGE IN A CHANGING SOCIETY

by

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Introduction

The preparation of this report has been faced with several difficulties. The comparative nature of the Bordeaux Colloquy suggests that the role of the judge should be studied not in one society but in the changing society of our time. Thus the term refers to an abstraction which has to be based upon some sort of empirical evidence. Looking at the legal systems covered by the draft Recommendation of the Council of Europe on public liability for judicial acts, I think that the analysis should be confined to the highly developed "western" type of society. Another problem concerns the presentation of the phenomenon of social change. It certainly has to be explained not in legal terms but by notions which result from the efforts of other disciplines like history, economics and sociology. But the restricted size of the report and the equally limited amount of time available do not allow an exhaustive inter-disciplinary study of the subject to be made. For this reason, the report should be understood as a preliminary and incomplete approach, as an essay intended to stimulate discussion. It is centred on the notion of "Verrechtlichung" which can only be translated by "legalisation" or "juridification" in a very inadequate way. "Verrechtlichung" means more than the permanent increase of law (a quantitive change); it includes the continuing penetration of social institutions by law, a process which changes the quality of not only the legal system but also of the human relations which become affected.

The paper is divided into four parts. In a first step, I try to identify some major elements of social change stimulating "Verrechtlichung" (I). The following part should indicate how these changes affect the regulatory functions of the legal system; the emphasis is laid on the diversification of rule-making powers (II). This leads to the central issue: what is the function of the judiciary in such a system (III)? Finally, I want to raise the question of how these changes actually or potentially affect the mechanisms of judicial accountability (IV). The above-mentioned limits to such a study restrict not only the text but also the documentation of the report: the references in the footnotes are meant to illustrate further the line of argumentation; they should not be understood as a bibliography representing an in-depth study of the subject (1).

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(1) The following publications are cited only by their authors:

Cappelletti, Who Watches the Watchmen? A Comparative Study on Judicial Responsibility, Am. J. Comp. L. 1983, 1-62; Dawson, The Oracles of the Law (1968); Simon, Die Unabhängigkeit des Richters (1975); Kübler (ed.), Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität - Vergleichende Analysen (1984); with contributions by Zacher, Simitis, Kübler, Hopt, Teubner (citation: Zacher, ..., in Kübler).

I. Social change and legal growth («Verrechtlichung»)

Since the legal system has evolved to the stage of a distinct set of institutions, increasingly separated from other public organisations, social change has affected the function of the judiciary: «the contributions judges have been able to make have depended on a combination of variable factors - not only their relations with political rulers but the sources from which law itself has been derived, the authority possessed by other spokesmen, the methods by which lawyers have been trained and recruited, the nature and the rate of social change» (2). Looking back to the times when a legal profession first emerged from the Inns of Court in England and the (North-Italian) faculties of law on the European continent, it seems that this development has accelerated and become more and more complex during the last decades. One important aspect of this mutation is the rapid expansion of law, the continuing penetration of social relations by legal structures. The factors forming this development are highly interdependent, but for analytical purposes they have to be separated. I suggest the following distinctions:

1. The «technological revolution» may appear to be the most evident single stimulus for legal growth. It has generated not only new sets of rules (eg for products liability) but also complete new fields of law (eg the regulation of road traffic or of nuclear energy) (3). But the impact of technical innovation is not restricted to «local» growth of law. How deep the whole web of legal structures is involved can be demonstrated by the examples of electronic communication and information technology; three aspects at least should be mentioned:

a. Broadcasting was from its emergence seen to be different from the print media. It was soon institutionalised, therefore, by completely new legal forms: the «public service» corporation in Europe (4) and the «Federal Communications Commission», an administrative agency with broad regulatory powers in the US (5). This creation of new institutions of administrative law had far-reaching repercussions in other fields like constitutional law (where the free press clause had to be adapted (6)),

(2) Dawson, p. XVII.

(3) Compare Ossenbühl, Kernenergierecht (second ed. 1982).

(4) See the national reports by Fromont (France), Lincoln (Great Britain) and Lerche (Germany) in Bullinger/Kübler (ed.), Rundfunkorganisation und Kommunikationsfreiheit (1979) pp. 15, 109 and 125.

(5) Ample documentation by Franklin, Mass Media Law (second ed. 1982) Chapter V to VII.

(6) In Germany: BVerfGE 12, 205; 31, 314; 57, 295. In the US: NBC v US, 63 S.Ct. 997 (1943); Red Lion v FCC, 89 S.Ct. (1969); FCC v Pacifica, 98 S.Ct. 3026 (1978).

tort law (where new rules on defamation and privacy evolved (7)), copyright law, etc. The use of cable and satellites generates new regulatory problems (8) with increasingly transnational legal implications (9).

b. The rapid expansion of computers makes it possible to store and use an enormous amount of personal data. The reaction of the legal system is not restricted to special legislation. «Data protection», too, has been rooted in constitutional law (10). As a general principle it deeply affects communication between different agencies of public administration (11). And it is moving towards becoming a «general system of allocation» of information, aimed at the preservation and restoration of the individual's capacity to communicate with others (12).

c. Finally, information technology has an even more direct impact upon the legal system. The possibility of processing an ever-increasing amount of data allows for a more stringent enforcement of traditional rules and at the same time the introduction of new forms of regulation. Examples can be found in the fields of accounting, taxation and criminal investigation.

2. Another major factor in the expansion of legal structures is to be seen in economic development. It is more than mere growth in quantity (as for instance of the GNP). Much more important is the diversification of economic functions and the ever-increasing number of economic transactions.

a. The impact of economic diversification can be illustrated by the problem of old age provision. Until the beginning, or even the middle of the 19th century, it could be solved on the basis of private property, family relations and succession. When a farmer or blacksmith grew old, he would leave his land or his workshop to his son who would then feed his parents for the rest of their lives. No doubt this relationship between parents and children was also a legal one, but the relevant

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(7) See Red Lion loc.cit. (as to fairness doctrine); BVerfGE 35, 202 (as to new concept of privacy).

(8) For Great Britain see Veljanovski/Bishop, Choice by Cable (1983).

(9) See the 1977 and 1979 resolutions of the World Administrative Radio Conference (WARC) and the recent «Green Book» of the Commission of the European Community on «Television Without Frontiers».

(10) BVerfGE 65, 1 («Volkszählung»).

(11) See W Schmidt, Amtschilfe durch Informationshilfe, Zeitschr. für Rechtspolitik 1979, 185; Denninger, Die Trennung von Verfassungsschutz und Polizei und das Grundrecht auf individuelle Selbstbestimmung, 1981, 231.

(12) See Simitis, Datenschutz: Voraussetzung oder Ende der Kommunikation? Festschrift für Coing vol. II (1982) pp. 495, 515-520.

rules were not only comparatively simple but also fully integrated into traditional patterns of everyday life. This system was increasingly eroded by the rise of the big industrial organisation. It separated work not only from private property but also from family relations, thus leaving the individual with the problem of how to continue life once he was unable to work. As a response to these needs new systems of regulation came into being. In Europe the predominant approach was «social security»: a government-mandated public law system based less on saving and investment than on new mechanisms of income redistribution (13). In the US a much more important role was played by private institutions like pension funds, life insurance, mutual funds and trusts. Their reliability became more and more the objective of government intervention: the tremendous development in securities regulation (14), the permanent legislative activities of Congress in this field can only be explained by the urgent desire on the part of an important part of the population to reduce the risks of long term private investment. The development over the last decades is marked by the increasing co-existence of both approaches: the US have expanded welfare legislation whereas important European countries have considerably enlarged their legal provisions for investor protection (15).

b. A still more important factor in «Verrechtlichung» is the enormous increase in commercial and private transactions. The conclusion of a contract involves costs: the market has to be explored, the price and other conditions have to be negotiated. The amount of work (time) and money and other valuable goods spent for this purpose are summarised in the notion of «social» or «transaction costs» (16). If the number of transactions - as a result of mass production and mass consumption - increases and if they refer to complex objects, like investment plans

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(13) See the comparative analyses by Zacher, Verrechtlichung im Bereich des Sozialrechts, in Kübler loc. cit. pp. 14, 48-67.

(14) It is difficult to give an idea of the size of this field of law. The leading text book (Loss, Securities Regulation, 1961-69) comprises six volumes with more than 6,000 pages.

(15) Examples: the introduction of the Commission aux Opérations de Bourse (COB) in France and of the Commission Bancaire in Belgium (both influenced to a considerable degree by the experience of the Securities and Exchange Commission (SEC) in the US); the enactment of criminal law statutes against insider trading in France and Great Britain.

(16) Compare Coase, The Problem of Social Cost, Journal of Law and Economics 3, 1-44 (1960); Williamson, Transaction Costs Economics: The Governance of Contractual Relations, loc. cit. 22, 233-261 (1979); Calabresi, Transaction Costs, Resource Allocation and Liability Rules - A Comment, in Manne (ed.), The Economics of Legal Relationships (1975) pp. 204, 206-210.

or long term insurance or potentially dangerous goods (cars, drugs, etc), transaction costs will be felt to be a burden, making many exchange relationships too expensive and thus preventing socially desirable operations of resource allocation. The classical method of reducing transaction costs is standardisation; and the most common business device is the standard form contract. It is often elaborated and imposed by a big organisation to the disadvantage of the great number of its customers or buyers or employees etc. Sometimes they are able to defend their interests by creating an organisation of their own which will then negotiate a collective agreement (17). But outside labour relations the costs of organisation will often be too high compared with the advantage to be gained from serious bargaining (18). In this situation the enactment of mandatory legal rules - forcing, for example, the producer or seller to disclose risks inherent in the item sold - will often prove to be the most efficient, which is the least expensive, solution. This means that mandatory rules of consumer or investor protection serve the purpose of improving not only the distribution of wealth but also - and perhaps primarily - the efficiency of the relevant market (19). These findings based on economic analysis of law are important as they lead to the conclusion that legal structures are closely linked to the state of the economy and that further economic development is very likely to produce additional legal rules.

c. The observation that legal rules very often serve the important economic function of reducing transaction costs and thus improve economic efficiency points to another interesting aspect. It is obvious that the generation and enforcement of legal rules also produce social costs. Therefore it may be theoretically assumed that there exists some sort of balance: whenever transaction costs grow beyond the costs of regulation, regulation will be introduced. But if we take into account that there are different types of rules (statute, regulation by administrative agencies, self-regulation etc), it may also be assumed that the choice between these alternatives is equally influenced by economic considerations: if self-regulation (eg by collective agreement)

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(17) This is true also for collective bargaining in labour law, although it serves other purposes (eg of distribution) at the same time.

(18) See Olson, The Logic of Collective Action (1965).

(19) This is also true for many very traditional rules and institutions of private law protecting «reliance» in commercial or private transactions. Thus institutions like the land register or the commercial register or mandatory rules as to form requirements in contracts or as to the powers of directors to represent commercial companies primarily serve the purpose of facilitating access to reliable market information and thus make it possible to achieve transactions without losing time and money in investigations.

is less expensive but equally efficient compared to statutory provisions, self-regulation will take the place of statute (20). If we apply these assumptions to the emergence and rise of case law in countries like France and Germany (21) it may well be asked if this development should not be explained also - not exclusively! - in economic terms: it could well be that in certain fields judge-made law is a particularly efficient and comparatively inexpensive alternative to regulation by Act of Parliament.

3. Another major factor in structural change is to be seen in the political environment of modern legal systems. Two aspects are to be emphasised:

a. After a long evolution, parliamentary legislation has ceased to be little more than the ratification of drafts and bills presented by the executive branch of government. Today parliaments may be called the clearing houses of the legislative process: they are the addressees for permanent social demands to regulate (or to abstain from regulation) and at the same time the institution where the majorities necessary for enactment are formed by permanent political negotiations and bargaining inside and between political parties. As a result, it has become obvious and generally accepted that law is made and changed permanently for specific and often controversial social purposes (22): modern democracy has institutionalised the legitimacy of an instrumental concept of legal rules. At the same time, experience has shown that parliamentary legislation is a complicated and cumbersome process. There are good reasons for assuming that the legislative capacity of parliaments is rather restricted: only a limited number of Acts and statutes can make their way through the various committees and chambers during a legislative period. On the other hand, the social need for regulation appears to have grown considerably and far beyond the rather narrow gate of parliamentary legislation. As a result, parliaments have, not formally but in fact, lost their legislative monopoly: regulatory functions have been transferred to or seized by other institutions. This has contributed to a diversification of rule-making powers which will be discussed below in Part II.

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(20) To illustrate this point: the fact that insider trading is sanctioned by criminal law in France and Great Britain and by (a rather weak form of) self-regulation in Germany can be explained in many ways. But one aspect is that there are considerably more listed companies in France and Great Britain than in Germany. Therefore it may be assumed that the number of relevant stock transactions is much higher in the former countries, and this difference accounts for the higher costs of enacting and enforcing statutory regulation.

(21) See Dawson pp. 374-502 and below Part III.

(22) Compare Luhmann, Rechtssoziologie (1972) pp. 192-205.

b. Another important aspect could be referred to as «federalisation». Under a democratic constitution federal systems need constitutional adjudication; if state governments as well as the federal government receive their respective political mandates equally by direct election none of them can claim a higher legitimacy; therefore conflicts of jurisdiction have to be settled by a neutral arbitrator. It is evident that the institution of constitutional adjudication adds new and particularly important functions to the role of judges. The examples of the American Supreme Court and the German Federal Constitutional Court indicate at the same time that judicial powers in the field of constitutional law are not necessarily restricted to the issues of federalism: both Courts are charged with the equally important task of supervising legislation as to its material compliance with the constitution. Some tendencies to extend jurisdiction have become evident in this field: even appellate court decisions in private law cases have been reversed as unconstitutional (23). Comparable developments can be observed in the field of international law where the traditional pattern of bilateral agreement is replaced by international organisations with judicial functions of their own. The European Communities appear to offer a particularly interesting illustration. They have certainly transgressed the realm of international public law without yet becoming an entity comparable to a federal State. But the European Court of Justice shows many of the features recognisable from constitutional adjudication: it has not only the task to decide controversies between member States and Community institutions but also the privilege of interpretation of Community law (24); and this power is regularly used in a spirit favouring further integration.

4. A final and particularly difficult question is how legal structures are affected by cultural change.

a. A first observation refers to education in a very broad sense. Not very long ago, it was thought to be a natural process legitimately reproducing the pre-existing social structures. In the US 30 years ago, a court decision started nothing less than a revolution by imposing the racial desegregation of schools (25). Today it appears to be generally agreed that the process of socialisation of a new generation forms the society of tomorrow and that education has become a very important tool to distribute life expectations. Everything else is controversial and therefore the object of rapidly expanding regulation: access to schools and universities, curricula, grades and examinations, the recruiting of educators etc.

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(23) Compare the «Lüth» decision of BVerfGE 7, 198 with New York Times v Sullivan, 84 S.Ct. 710 (1964).

(24) Art. 177 EEC Treaty, 150 Euratom Treaty; Art. 41 ECSC Treaty; see also Ipsen, Europäisches Gemeinschaftsrecht (1972), 370-373.

(25) Brown v Board of Education, 347 US 483 (1954) and 349 US 294 (1955).

b. A second and particularly important point could be called the erosion of ideological homogeneity. In former times, including «la société bourgeoise» of the 19th century, people within a legal system (State) tended to have very much the same beliefs and convictions. Modern societies have become «pluralistic»: they are characterised by a rapidly growing diversity of religions, moral and ideological convictions and attitudes. This diversity affects the meaning of language. A hundred years ago it could still be assumed that basic legal notions like «fairness», «equity», «due process», «freedom», «equal rights» etc would be understood by all citizens in roughly the same way. Today the meaning of the same vocabulary can be extremely controversial: a religious traditionalist and feminist leader may disagree fundamentally as to what the requirement of «equal rights for men and women» really means. Generally speaking, in applying the law courts are less and less able to rely upon a semantic consensus as to the precise content and bearing of basic legal notions. Instead they have to determine the meaning of such concepts in the struggle of conflicting interpretations and understandings.

5. In place of a summary, it should be stressed that all the elements of social change are highly interdependent. This is particularly obvious where the rapid growth of trans- and supranational level relationships and structures is concerned. Technical innovations have created the infrastructure for an enormous, increasing flow of persons, goods and information across borderlines. This development is generally assumed to be an indispensable condition of further economic growth. It therefore has to be based on and supported by the harmonisation of existing national law and the creation of new supranational rules of law (26). This again implies new political structures and organisations. At the same time the transnational interchange accelerates the national developments in cultural diversification.

II. Structural change in the legal system: the diversification of regulatory functions

The continuing transformation of legal structures can perhaps best be shown against the background of a legal system which was conceived in the 18th and put into action in the 19th century. Despite considerable differences between France, Great Britain and Germany some common features can be identified. The system is built upon two pillars: parliamentary legislation and the courts. As far as the transformation from the ancient régime to a liberal society has been achieved there is little need for legal change; but where and whenever it has to take place change is reserved exclusively to legislation by the national parliaments. As the judicial function has to be separated completely from the legislative power, judges are excluded from any form of rule making: they are nothing but «la bouche de la loi»; their power is «en quelque façon nulle» (Montesquieu). The institutional techniques by which the judiciary is kept in the role of mere application of pre-existing rules are quite different. In England, it is the self-imposed restraint of

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(26) Which may be the reason for the growth of national law; see below, text to footnote 36.

stare decisis (27). In France, judicial discretion is eliminated by the assumption that codification has achieved complete and internally consistent coverage of all issues worthy of being regulated (28). In Germany, at least private law is still largely based upon the Roman law tradition, but by the methodological concepts of the «Begriffsjurisprudenz» lawyers - and particularly judges - are completely excluded from any ethical, political or economic considerations when applying the law (29).

The process of «Verrechtlichung» as described in Part I has long since, and with growing intensity, eroded the basis of this classical building. A major aspect of the structural change taking place in our time is the diversification of regulatory functions. Parliamentary legislation is no longer the only source of law. The new structure is more complicated; it can be described as a widening spectrum of levels of regulation above as well as below the level of formal regulation by parliamentary statute:

1. There are two major forms of rule- making above the level of national legislation:

a. The first is supranational law. It appears today in different forms with differing impacts. International public law applies only to States; they are the only subjects that may be parties before the International Court of Justice (30); thus the impact upon the activities of national courts seems to be comparatively insignificant. A much more important development can be observed where «regional» structures of supranational law have evolved. The European Communities offer a particularly interesting example. The European Court of Justice has made it clear at an early stage that Community law invalidates conflicting national law (31) and that it refers not only to the member States but also to their citizens (32). This understanding that Community law is a "self-executing"

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(27) Dawson pp. 80-99; Plucknet, A Concise History of the Common Law (fifth ed. 1956) pp. 342-350.

(28) Dawson pp. 386-400, in particular p. 393.

(29) This position has been expressed most clearly by Windscheid; see Dawson p. 460; Simon pp. 104-108. A very perceptive study of the theory of judicial functions in 19th century Germany is now presented by Ogorek, Richterkönig oder Subsumtionsautomat (typoscript 1984).

(30) See Rosenne, The World Court - What It Is and How It Works (third rev. ed. 1973) p. 66; Seidl-Hohenveldern, Völkerrecht (fifth ed. 1983) p. 381.

(31) European Court of Justice, Costa v ENEL, Common Market Law Review 1964, 425.

(32) European Court of Justice, Van Gend & Loos v Netherlands Inland Revenue Administration, loc. cit. 1963, 105.

and «directly effective» legal order has in the course of time been accepted by the national courts (33). Thus a court of one of the member States may today reject in all sorts of litigation the application of national statutes and provisions in favour of the contradictory rules of Community law.

b. At least in some countries, like the USA and the Federal Republic of Germany (and to a certain extent also Italy), constitutional law is no longer restricted to the function of a formal distribution of powers and jurisdictions between different institutions and agencies of the State. Instead the constitution presents - primarily (but not only) by including a catalogue of legally binding human and civil rights - a substantive (or material) framework for social life. Its enforcement is the task of constitutional adjudication. In spite of rather different procedural prerequisites, it generally confers on courts, at least to some degree, the power to correct legislative measures and rules by applying the standards of constitutional law. This activity is not restricted to public law; it may take place in different fields of private law like torts (34), company law (35), family law and others. In countries without a (written) constitution and without (institutionalised) constitutional adjudication, a similar role can be played by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its enforcement by the European Court of Human Rights. Thus it seems that this court has contributed considerably to the introduction of judicial control of prisons in Great Britain (36).

2. There are also various forms of rule-making which have evolved below the level of parliamentary legislation:

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(33) For Belgium, see Cour de Cassation, 27 May 1971, EuR 1974, 261; for France - at the end of a lengthy development (documented by Bergsten, Community Law in the French Courts, 1973) - Cour de Cassation, 24 May 1975, Rec. Dalloz Jurisprudence 1975, 497; for Italy, Corte Constitutionale EuR 1974, 255; 1976, 54; 1978, 194; for the Federal Republic of Germany, BVerfGE 22, 293; 31, 173; 37, 271. For general a discussion see Zuleeg, Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich (1969); Federation Internationale pour le Droit Européen (FIDE), Remedies for Breach of Community Law (1980); with reports by Mertens de Vilmars, Goffin, Rasmussen, Rengeling, Finbarr, de Caterini/Motzo, Weirich, Braakman, Usher/Donaldson, and Bebr.

(34) See references in footnote (23).

(35) In the US: First National Bank of Boston v Bellotti, 435 US 765 (1978); in Germany: BVerfGE 14, 263 («Feldmühle») and 50, 290 («Mitbestimmung»).

(36) See Blom-Cooper, Lawyers and Public Administrators: Separate and Unequal (1984) pp. 6 and 7.

a. «Delegated legislation» (37) or «bureaucratic regulation» (38) by government agencies authorised by statute is a well-known phenomenon in continental administrative law: «décret-lois» in France and «Rechtsverordnungen» in Germany have been used for a long time. In recent times the use of this device has been considerably extended: it is no longer restricted to the traditional fields of public administration (like local government or the maintenance of public safety and order) but has become an instrument for the implementation and enforcement of economic and social policies. This evolution is particularly evident in the US where an increasing number of independent administrative agencies like the SEC or the FCC (39) have been given broad regulatory powers (40). This form of regulation has become a major factor of «Verrechtlichung» and has therefore provoked far-reaching programmes of «deregulation» which have certainly had some success but so far do not appear to have changed the basic structure of the system. A European analogy can be found in the regulatory powers of the Commission and the Council of Ministers of the European Communities: they too allow for a bureaucratic form of rule-making as the Communities lack any direct democratic legitimation by parliaments or other institutions representing those subject to the regulations.

b. Another phenomenon of still-growing importance can be referred to as «regulation by self-regulation». In many cases modern legal systems provide institutions and procedures in order to allow and promote the production of general rules by private agreements. The classical examples are provided by labour law. To be sure, collective bargaining evolved as a spontaneous response to the challenge of industrialisation. But long ago the formation and the effects of collective agreements have been integrated into the legal system: they became formally recognised as legally restricted instruments to regulate industrial relations (41). In some European countries legislation has added a similar system of «works councils» (Betriebsräte, comités d'entreprise): it also presents a legal framework for self-regulation, this time at the level not of industries as a whole but of single industrial plants. Yet self-regulation by agreement is not necessarily based on some form of special authorisation by law. It can also be arranged as a private institution outside and independent of all mechanisms of State intervention. A particularly interesting example is presented by the City Code on Take-Overs and Mergers which was elaborated in 1968 by the financial community of Great Britain. Its 14 general principles and 39 rules are

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(37) This term is used for Great Britain by Harris, An Introduction to Law (second ed. 1984) p. 159.

(38) See Kübler, Verrechtlichung von Unternehmensstrukturen, in Kübler pp. 167, 204-207.

(39) As to these institutions, see Part I.1 (a) and 2 (a) and footnote 15.

(40) For a description and discussion, see Bernstein, Regulating Business by Independant Commission (1955), and Scharpf, Die sozialen Kosten des Rechtsstaats (1970).

(41) For a particularly perceptive comparative and structural discussion, see Simitis, Zur Verrechtlichung der Arbeitsbeziehungen, in Kübler pp. 73, 120-143.

enforced by the City Panel, an equally private institution which in 1978 became a part of the newly-established Council for the Securities Industry - a «voluntary, and extra-statutory, watchdog organisation to supervise all forms of financial dealing by city institutions» (42).

3. Another important aspect can be mentioned only very briefly: the structural change in parliamentary legislation. It can best be demonstrated by comparing the big codes in the civil law system with the Acts and statutes of our time. Codification was designed to create a permanent, consistent and inclusive order which would give a clear and precise legal answer to every fact situation coming before the judge (43). Modern legislation tends to be incremental, fragmentary, preliminary and vague. This is largely due to the elements mentioned in Part I: social needs, transformed into political pressure, provoke quick reactions to specific points, leaving no time for the working out of solutions that would really fit into a consistent arrangement of norms and institutions. Where controversial positions have to be harmonised the political solution will often be a very vague version of the law which remains open to several interpretations. Or the real decision is formally delegated to one of the other rule-making institutions. Or the transformation of supranational law, eg of a European Community directive, results in the difficulty of having to introduce systematically foreign elements into the traditional context of a given legal order.

4. The last and most important point is the emergence and rise of case law in the sense of an undisguised exercise of regulatory functions by the judiciary. Despite all the traditional differences between the common law and the civil law systems, between an American and an English development respectively and a French and a German one, this modern form of judge-made law has become a common feature of the legal order of western industrialised societies. Although its evolution has been quite different in countries like France, Great Britain and Germany (44), the development appears to have been accelerated everywhere during the last decades. Particularly during the 50s

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(42) Gower/Cronin/Easson/Lord Wedderburn of Charlton, Gower's Principles of Modern Company Law (fourth ed. 1979) p. 55. A German parallel can be found in the insider-trading rules fixed by a private agreement between national business associations and the association of stock exchanges.

(43) See Wieacker, Aufstieg, Blüte und Krisis der Kodifikationsidee, in Festschrift für Böhmer (1954) pp. 35-54; Kübler, Kodifikation und Demokratie, Juristenzeitung 1969, 645-651; Damaska, On Circumstances Favouring Codification, Revista Juridica de la Universidad de Puerto Rico 1983, 355-171.

(44) For an exhaustive comparative study see Dawson pp. 80-99, 374-431 and 432-502.

and 60s the US have experienced an «activist» Supreme Court pushing for reform in fields like racial desegregation (45), abolition of capital punishment (46), due process in criminal prosecution(47). In 1966, the English Law Lords by their collective «Statement on Precedent» formally declared «that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of law» (48); this is seen as the expression of a certain change of attitude on the part of the English judiciary (49). When the German Federal Court started to award punitive damages without any basis in statute or precedent (50), the Federal Constitutional Court held that this was in conformity with the due process as well as the democratic principles of the constitution (51).

III. Judicial functions in a complex legal system

1. The rapidly growing importance of judicial regulation is often criticised as a usurpation of powers which should remain with the legislative bodies. Such an understanding regularly seems to be strongly inspired by the ideas and structures of a past era. Looking at the evolution of modern societies, the more active and creative role of judges appears as a necessary result of structural changes in the legal system. The most important aspects of this transformation are to be summarised as follows:

a. Traditional legislation has become increasingly vague and inconsistent. Thus it is one of the tasks of the judiciary to implement and harmonise the existing legal rules.

b. The imposition of directly applicable («self-executing») rules and principles of supranational and constitutional law authorises the courts to adapt or invalidate conflicting provisions of «normal» law. This increasingly important function enlarges the discretionary powers of

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(45) Brown v Board of Education, 347 US 483 (1954) and 349 US 294/(1955) overruling the «separate but equal» doctrine originally announced in Plessy v Ferguson, 163 US 537 (1896); the historical development and the conceptual framework is presented by Tribe, American Constitutional Law (1978) pp. 981-1052.

(46) See Woodson v North Carolina, 428 US 280 (1976); Harry Roberts v Louisiana, 97 S.Ct. 1993 (1977).

(47) See Gideon v Wainright, 372 US 355 (1963); Miranda v Arizona, 384 US 436 (1966).

(48) Citation taken from Paterson, The Law Lords (1982) p. 126.

(49) Paterson loc. cit. pp. 143-146.

(50) BGHZ 26, 349; 35, 363.

(51) BVerfGE 34, 269. In a new decision (BVerfGE 65, 182) the court tries to limit the regulatory powers of the court; see below IV (2) (a).

judges in various respects. Supranational law very often follows a conceptual and structural approach quite different from the national law to which it has to be applied: in this case, the court has to establish a relationship between both systems via their constructive interpretation. Constitutional law, being conceived as a long term normative framework for the development of the community is necessarily fixed by rather vague and general terms which again have to be implemented and - over a longer period of time - adapted by the judiciary; thus, in the long run, the meaning of the constitution is ultimately determined by constitutional adjudication. The amount of judicial discretion increases still more where the court plays constitutional against supranational law. Thus the German Federal Constitutional Court in a much disputed decision has held that Community law may be invalidated when it conflicts with German constitutional law, at least as long as the European Communities are not subject to their own constitutional framework of directly binding human and civil rights (52). Finally, it has to be recognised that «self-executing» rules of supranational and/or constitutional law have a fundamental impact even if there are only very few occasions for their application. They change the relationship between (traditional) law and judges in a (probably) lasting way: the judge is no longer simply subject to the law; from now on he is invested with the responsibility and the power to control legislation as to its conformity with other sources of law.

c. The diversification of regulatory powers also affects judicial functions with respect to regulation by administrative agencies and self-regulation by private bodies. Very often legislation has not defined sharply the limits of the jurisdiction of these rule-making institutions. Here the judges are increasingly called on to act as referees, settling conflicts of jurisdiction between various levels of rule-making. Again labour law can serve as an example: in most countries it has become a major task of the courts to define the area left to collective bargaining between mandatory statutory rules of worker protection and a legally institutionalised work's council system.

d. In a more generalised way, it can be said that the legal system has been gradually transformed from a simple and static structure granting legal stability to a complicated machinery designed for the purpose of securing and promoting stable social development by legal change. This machinery consists of different parts: its constitutional elements present the stable framework; parliamentary legislation moves rather slowly as it is directly bound to the democratic process; administrative rule-making and the mechanisms of self-regulation offer the highest degree of flexibility and adaptability. Unfortunately this machinery is far from perfect. Self-regulation tends to give particular interests preference before general needs. Administrative regulation may be distorted by bureaucratic routine (or self-interest). Legislation is often blocked by complications in the political process; and its capacity is limited (53). Thus the whole system tends to become more and

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(52) BVerfGE 37, 271.

(53) See above Part I (3) (a).

more fragmentary and inconsistent: regulatory purposes can be frustrated by using techniques of circumvention. In very generalised terms it can be said that the courts have stepped in and have accepted the task of integrating the different elements of the system by filling the gaps left open by the shortcomings of the regulatory process. The rise of case law is just one - particularly important - aspect of this situation. In many fields the real meaning of statutes and other regulations cannot be determined without taking into account how the courts are fitting the different elements of the system together.

2. In this paper courts and judges have so far been discussed as homogeneous types of institutions and figures. In reality they are different in many respects. There are important national deviations from the rather abstract model presented here. Other differences refer to specific disciplines; thus the administration of justice seems, at least in the civil law countries, to follow the formal emanations of parliamentary legislation much closer in criminal law than in, for example, company or labour law. Finally, it is obvious that the general development presented here is more valid for the judges in the higher courts than for those in the lower courts. But even this distinction should not be over-emphasised. The particular responsibility of the European Court of Justice for the interpretation of Community law, of the US Supreme Court and the German Federal Constitutional Court for the understanding of written constitutions or the French and Belgian Cour de Cassation for the adaptation of civil law to changing circumstances does not mean that the lower courts in these countries have stayed where they were a hundred years ago. Their position is certainly different as they are in fact, also bound to a certain degree by the decisions of the higher courts. But there are many fields where the web of case law is still rather loose. And in many cases the push for legal change has come from the lower courts. Even where they are formally obliged to follow the decisions of their higher courts they are able to go their own way by using the technique of distinguishing the fact situations. There is a difference in degree but not in substance.

3. Thus the role of the judge in a changing society can be stated in general terms. The concept that judges are merely applying pre-existing rules to fact situations by logical operations has obviously become obsolete. German scholars, mainly, have tried to formulate a binding theory of legal methods (juristische Methodenlehre) which would exclude judicial discretion where the law itself no longer presents a clear and precise rule (54). But in the meantime it has become obvious that distinctions between the application of law via analogy and the closing of «gaps» by deciding «praeter legem» cannot solve the problem: the existence of such a «gap» depends on how the judge understands and construes the law; thus, it is again his decision between alternative solutions that determines the outcome of a given conflict. Faced with an imperfect legal order and a growing demand for normative flexibility, the judge in an increasing number of cases has to make policy choices. They can often be disguised in terms of procedure: thus the invalidation of a statutory provision by a constitutional principle may depend on the answer to the question of whether the complaining party has «standing»

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(54) For an excellent presentation and discussion see Simon pp. 68-145, in particular 69-103.

to invoke constitutional protection. Or the substantive issue is decided by affirming or denying the jurisdiction of a (self-) regulatory institution. Thus in an increasing number of cases the rule upon which the decision is based is generated by the decision. The conclusion that the judge is no longer subject to the law, but the law is subject to the judge (55), may be an exaggeration; but it cannot be denied any longer now that a growing part of the legal structures constituting modern societies are the product of judicial law making.

4. Many literary contributions made by judges to the discussion of judicial regulation (56) make it perfectly clear that judges in general know what they are doing when they intervene in order to close the gaps left open not in a particular statute but in the complicated structure of modern legal systems. At the same time it should be obvious that this expansion of judicial responsibilities cannot be qualified as a usurpation as it has become an indispensable element for the functioning of the system as a whole. But this is certainly not to say that judges can or should be absolutely free in deciding the conflicts brought before them. A legal system that needs judicial contributions to law making certainly needs mechanisms which are able to secure that the exercise of this regulatory function really corresponds to social needs. This is the problem of judicial accountability.

IV. Mechanisms of judicial accountability

Public liability for judicial acts can serve several purposes. It provides for compensation for damage suffered by a person subject to some form of judicial action (or non-action). At the same time it may serve as a sanction determined so as to secure a certain way of behaviour, which means: as a mechanism of accountability (57). Being a tort, its application depends on proof of fault. As far as the core of judicial action is concerned, liability can be imposed only as long as the applicable law is clear and unambiguous. If the legal system allows several solutions to a given conflict it may well be that one answer proves in the end to be more desirable than another one; but it will be difficult to establish that the choice among these alternatives constitutes an intentional or negligent violation of judicial duties. Thus it seems that in a developed legal system judicial liability will no longer be able to function as an efficient mechanism of judicial accountability. This observation could explain the impression that

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(55) See Simon p. 82 (referring to Less, Vom Wesen und Wert des Richterrechts, 1954).

(56) For a comparative discussion see Fischer/Adams/Sperl/Cornish, Das Entscheidungsmaterial der höchstrichterlichen Rechtsprechung (1976).

(57) This, of course, is only true if the judge can be held personally liable be it, in the case of State liability, that the government is allowed to recover from the judge the amount of damages it has paid in order to compensate the victim for the losses suffered from the violation of judicial duties.

in fact the importance of liability for judicial decisions has steadily declined (58). But then the question arises by what other devices is or can conformity of the exercise of judicial power with the functional requirements of the legal system and the needs of those subject to judicial regulation be achieved. There are basically three alternatives to civil (and penal) liability: the appeal system, control by other government institutions and public opinion.

1. In principle, the appeal system is not new: for a comparatively long time parties in civil and penal litigation have had the opportunity to attack an undesirable decision before a higher court. But it seems that there have been some interesting changes during the last decades:

a. With some exaggeration, it can be said that the traditional function of the appeal system has been the correction of mistakes in the application of law. This again refers to a system where the law - be it by precedent or by a code - is expected to give clear and precise prescriptions leaving no or very little discretion to the individual court. With the rise and recognition of case law the emphasis has moved towards the goal of harmonisation and innovation: it is obviously desirable that rules are generated by judicial law making and that these rules be the same for the legal system as a whole. This change is indicated clearly by the emergence of the technique of «prospective overruling». As long as it can be assumed that the decision rendered by the lower court was wrong there is no reason to protect the expectations of the parties involved. The position is different when the lower court follows traditional convictions and the higher court thinks that legal change is desirable: in this case a party that has relied upon existing principles is protected if the court announces that the new rule will be applied not to this but to every future case.

b. Another significant feature of the structural development towards «Verrechtlichung» is that the opportunities for appeal have been increased. Thus in Germany every measure taken by a public authority can be brought before the Federal Constitutional court if a complainant shows that his human or civil rights have been affected; and this complaint can also be directed against decisions of lower courts (59). In a similar way, private parties have access to the European Court of Justice under Arts. 173, 175 and 177 of the EEC Treaty and corresponding provisions of the other European Treaties. Finally the citizens of those States who have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms can apply to the European Commission of Human Rights and eventually to the European Court of Human Rights to hear their cases if they plausibly claim violation of their protected rights (60).

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(58) That seems to be equally (or still more) true for penal law sanctions: the requirement of an intentional infraction cannot be established as far as discretionary powers are exercised (see Cappelletti p. 37).

(59) See references in footnotes (23) and (35).

(60) For the details see Sohn/Buergenthal, International Protection of Human Rights (1973), 1008-101); Leech/Oliver/Sweeney, The International Legal System (1973), 650.

c. The new function of the appeal system is particularly obvious where it is used in order to contain law making by lower courts. This is illustrated by two examples. In the US, the federal district courts and courts of appeal have for a long time extended the reach of federal securities regulation and thus reduced the importance of State corporation law by deriving duties of management towards shareholders and the public from the anti-fraud provisions of Rule 10 (b)-5 Securities Exchange Act. The Supreme Court by a landmark decision has stopped this development. "Absent a clear indication of congressional intent, we are reluctant to federalise the substantial portion of the law of corporations that deal with transactions in securities, particularly where established State policies of corporate regulation would be overridden" (61). In a similar way, the German Federal Constitutional Court has intervened against the Federal Labour Court (62). In insolvency proceedings, this court had given priority to employees' claims for redundancy payments to the disadvantage of all non-privileged creditors. This decision was reversed for the following reasons: it was incompatible with mandatory provisions of the Konkursordnung (Insolvency Act); it thus violated the rights of creditors without any justification by constitutional principles; the measure itself was very controversial and had therefore to be reserved for parliamentary legislation (63).

2. The appeal system can be defined as the control of judicial acts by judges holding a higher position in the judicial hierarchy; it is a mechanism that works within the judiciary. It has to be distinguished from measures which can be used by other powers in order to influence the behaviour of judges.

a. In the civil law tradition, judges are public officials and as such are subject to disciplinary proceedings which may result in the imposition of disciplinary sanctions like warning or censure, loss of seniority or salary, forced transfer, compulsory retirement or straightforward removal (64). Disciplinary proceedings can be the reaction to behaviour outside or within the official function; but, for the sake of judicial independence, court decisions are exempted from any disciplinary proceedings or measures (65). In Germany, no disciplinary sanctions at all can be taken against federal

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(61) Santa Fe v Green, 430 US 462 (1977), 479.

(62) BVerfGE 65, 182.

(63) Loc. cit. pp. 190-195. The court decided that the complainants had standing as the decision of the Federal Labour Court violated their basic right of freedom by going beyond the limits of justified rule-making by courts. This argument sounds like an invitation to use the constitutional complaint against any form of undesirable judicial rule-making. This could result in a considerable extension of the jurisdiction of the Federal Constitutional Court.

(64) See Cappelletti, p. 46.

(65) For Germany see Kern/Wolf, Gerichtsverfassungsrecht (fifth ed. 1975) pp. 128-132.

judges (66): they can be removed from office only upon a parliamentary motion by a two-thirds vote of the Federal Constitutional Court for violation of the constitution. This rather symbolic provision (67) has been inspired by the impeachment proceedings in England and in the US which also appear to be rare exceptions, again without any real importance for judicial decision making (68).

b. Less discussed, but in fact much more important, is the selection and promotion of judges (69). In the common law tradition the office of the judge is not organised as a career but as a political or, like in England, a highly prestigious honorary function. Here the selection at the entry point is of major importance. In some of the American States the political impact is very obvious as the judges are either directly elected by the people or nominated by the executive which may sometimes be inclined to give more weight to political loyalty than to professional reputation. The federal judges are nominated by the President: they need the approval of the Senate. The strong political impact of this procedure is mitigated by occasionally heavy pressures exercised by the American Bar Association and other professional organisations against candidates thought not to be sufficiently qualified. In the civil law countries, the judicial function is a career. The initial appointment is normally determined by formal qualifications like the grades received in examinations or the ranking achieved in competitions; it is thus insulated from political influence (70). But this changes gradually as the judge moves up inside the judicial hierarchy: the closer to the top, the more promotion is influenced by political considerations. In order to guarantee the neutrality of the judiciary, most countries have restricted the dominating influence of the executive branch of government by providing for the participation of representatives of parliaments and of the judiciary itself (71). In Germany, the federal judges are elected by parliamentary committees. Thus it may be said that every system has developed institutions which make it possible to define judicial qualification, at least for the highest courts, (72) also in terms of

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(66) They are sitting only in the highest courts: the Federal Court (deciding in civil and criminal law matters), the Federal Labour Court, the Federal Social Court, the Federal Administrative Court, the Federal Tax Court and last, but not least, the Federal Constitutional Court.

(67) So far such a proceeding has not been started and not even been considered.

(68) See Cappelletti pp. 19-24.

(69) Cappelletti p. 52.

(70) Cappelletti p. 70.

(71) For France, Spain and Italy see Cappelletti p. 22; for Germany Kern/Wolf loc. cit. pp. 106 f.

(72) Which control the lower courts through the appeal system (see (1)).

political attitudes and which provide at the same time at least some safeguards against a mere partisan appointment policy. This mechanism achieves a high degree of institutional loyalty; and it provides for at least some sanctions even where appointments are for life or re-election is excluded: a court that deviates too far from the main stream of majority convictions (or the common interests of the power elites) runs the risk that future appointments will go in the opposite direction; and this will probably not facilitate judicial work. Thus selection and/or promotion should be understood as mechanisms securing some degree of political responsibility of judges.

3. A final and increasingly important aspect of judicial accountability is to be seen in the growing interest of the public. Here a distinction should be drawn between the more restricted area of the legal profession and its organisations and, on the other hand, the public at large represented mainly by the media of mass communication.

a. Judicial responsibility towards the legal profession has to be seen in the context of the duty to base the decision of the court upon a reasoned opinion explaining why other possible solutions have been rejected. This duty illustrates specific aspects of judicial power; as there is no direct democratic legitimation, courts are not allowed to decide like the legislative or the executive branches of government. The requirement of a reasoned opinion serves several purposes: it enforces a considerable degree of rationality and consistency in the judicial process, it provides a symbolic reference to the authorities upon which the decision is based and it exposes the judge to public scrutiny for his action. This latter aspect is particularly obvious where the disclosure of the dissenting vote is admitted: the individual judge is no longer hidden behind the collective; he appears to be personally responsible for his vote and for his arguments. And, in general, it is to be observed that the emergence of the particular role of the judge in a complex legal system is accompanied by learned publications concentrating upon the work of courts. There appears to be a shift of emphasis everywhere: in the common law system the importance of (academic) legal writing has grown considerably; in the civil law countries legal doctrine has moved away from its tradition of historical and conceptual elaborations. Thus the judge has become involved in an ongoing debate on the way he should or should not decide and argue certain issues; and the courts seem to become more and more aware of and receptive to this intensive form of communication.

b. At the same time, courts and judges have moved into the spotlight of public opinion. Of course, the newspapers have always covered spectacular murder cases or private litigation disclosing more or less savoury scandals. But nowadays the press and broadcasting will also, and often very professionally, give publicity to court decisions indicating significant changes in many fields of the law. These publications are not necessarily restricted to reporting the mere facts; journalists also tend to present their critical views on important court decisions. Even if it happens very rarely that mass media are able to influence the decision in a specific case, it has to be assumed that there are considerable long term effects on judicial attitudes and convictions: «Of all the controls of judicial activity that by public opinion is among

the most effective» (73). And the legal systems themselves have reacted in affirmative terms to this supervision of courts and judges through disclosure and publicity by lowering traditional obstacles to an open presentation of legal conflicts. Thus, in the Sunday Times case, the European Court of Human Rights reversed a decision of the House of Lords which had granted an injunction for contempt of court against the newspaper (74). In a similar way, the US Supreme Court has narrowed down the possibility of punishing reporting and criticism of judicial acts as contempt of court (75). These decisions stress for good reasons the constitutional requirement that judicial power should come and remain under the attention and supervision of the public.

V. Summary

1. The most important general impact of social (technological, economic, political and cultural) change upon the legal system has been its permanent growth in quantity and quality (which is called here «Verrechtlichung»).

2. The resulting structural modification of the legal system can be described as the diversification of regulatory functions: where the legal system had once been constituted by legislation and the courts, we are faced today with a broad spectrum of different levels of rule-making.

3. This transformation of the legal system from a simple and static structure granting legal stability to a complicated machinery designed for the purpose of securing and promoting stable social development by legal change has deeply affected the role of the judge: the courts had to step in with rule-making of their own in order to fill the gaps left open by the inevitable shortcomings of a much more complex regulatory process.

4. This modified role of the judge is reflected in the mechanisms of judicial accountability: here the emphasis has moved from more legal to more political forms of control.

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(73) Rheinstein, Who Watches the Watchmen?, in: Rheinstein, Gesammelte Schriften vol. 3 (1979) p. 16.

(74) Publications of the European Court of Human Rights, 1979, Series A. Nr. 30: The Sunday Times Case, Judgment of 26 April 1979.

(75) Bridges v California, 314 US 252 (1941); Pennekamp v Florida, 328 US 331 (1946); Craig v Haney 331 US 367 (1947); see also Nebraska Press Association v Stuart, 427 US 539 (1976) and Richmond Newspaper Inc. v Virginia, 448 US 555 (1980).

THE DIFFERENT FORMS OF PERSONAL LIABILITY OF THE JUDGE

by

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I. Introduction

This report deals with the different forms of personal liability of the judge. This, of course, refers to his liability for acts done and words spoken in the exercise of his functions and also for behaviour, when not exercising judicial functions, which might adversely affect the honour and dignity of the profession.

There are several solutions to the problem of a judge's criminal, civil or disciplinary liability; it affects on the one hand the principle of the independence of the judiciary and on the other the rights of litigants; a balance between these opposing interests is particularly difficult to achieve as it depends on the history and traditions of each country and the type of judicial organisation it has adopted; it also depends on the strength of the trade union and contractual rights of the body of public officers concerned.

In the first place this is, therefore, a problem involving a choice of cultural policy; but in solving it one cannot ignore the results and practical consequences of this choice. However, it is obvious that the problem is less serious in countries where the judiciary is less numerous: this makes possible a better selection of candidates on appointment and the relationship between judges and the public is characterised by the judge's constant need to obtain and retain the respect of the community and a good opinion of himself in relation to the exercise of his functions.

In general, it may be said that all European countries have finally established the principle of the independence of the judiciary vis-à-vis the other powers in the State and that the very concept of the judicial function, in which the ideals of objectivity and impartiality are inherent, implies that the judge shall have complete freedom in forming his judgments. In all countries these principles have led to a more or less extensive limitation of the judge's liability since the judge who is worried by what is going to happen to him as a result of his decisions is not an independent judge.

II. Criminal liability

Since the principle of independence is intended to safeguard the judge's ethical freedom in the exercise of his functions, nowhere do we find that the limits of his liability amount to a complete immunity. In particular, from the point of view of criminal law, a judge is always liable, even for his decisions, owing to the general nature of this type of liability. Besides one cannot speak of problems of ethical freedom with regard to a judge who deliberately misuses his powers in order to commit a criminal offence. On the question of the judge's criminal responsibility, it must be pointed out that in any case some offences are specifically connected with the exercise of judicial functions, so that they can only be committed by a judge; abuse of one's functions is usually regarded as an aggravating circumstance in the case of ordinary offences.

For instance, Article 183 of the French Criminal Code provides that "every judge (or administrator) who makes a decision out of favour or ill-will towards a party shall be guilty of misfeasance and punished by loss of civic rights";

Article 185 imposes a fine and temporary suspension from exercising public office on "any judge or court ... which on any pretext, including the silence or obscurity of the law, fails in the duty to render justice to the parties after having been called on to do so and perseveres in this attitude after receiving a warning or directions from official superiors". Like misfeasance, exceeding one's authority is punished by Article 127, which is obviously influenced by the principle of the separation of powers: this offence is committed (by a judge or a public prosecutor who interferes with the legislative power by issuing regulations containing legislative provisions; or terminating or suspending the implementation of an Act); or again by members of the legal service who exceed their powers by interfering in matters within the province of the administrative authorities.

Similarly, Article 328 of the Italian Criminal Code punishes a public officer (which includes judges) who, contrary to his duty, refuses, omits or unduly delays performing an act pertaining to his functions; other rules also in Part II of the Criminal Code relating to offences committed by public officers can apply to members of the legal service, who fall within the category of public officers. For instance, a judge may be charged with having a private interest in acts performed in the course of his functions (Article 324 of the Criminal Code).

Article 336 of the Criminal Code of the Federal Republic of Germany punishes public officers or arbitrators who fraudulently misapply the law to the advantage or disadvantage of a party; and under the heading of bribery, Article 334 of the same Code punishes a judge who accepts gifts or obtains a promise of other advantages in order to influence a decision.

The Spanish Criminal Code also contains the offence of misfeasance, various forms of which are dealt with in Articles 351 et seq, and also the offence of bribery (Article 385 et seq of the Criminal Code). I could give further examples. It should be mentioned that in nearly all European countries the judge's criminal responsibility requires an element of intention, ie a deliberate criminal intent, and liability for negligence, even gross negligence, is very exceptional. An example may be found in Article 355 of the Spanish Criminal Code which includes, among other forms of misfeasance, the case of a judge who through negligence or inexcusable ignorance has passed an obviously unjust judgment (arrêt).

Obviously there are criminal acts particularly connected with judicial functions which are punished in all countries, though their description may vary a little in any particular Code. One has the impression that in some cases wording which refers generally to the concept of a public officer avoids mentioning the judges in order to avoid creating the image of a negligent or culpable judiciary; however it is clear that in these Codes the expression "public officer" includes judges.

As for procedure, it is obviously undesirable that a member of the legal service should be judged by his colleagues at the very place where he has exercised or is still exercising his functions. This brings us to the problem of creating an exception to the ordinary rules of jurisdiction. The possible solutions are a choice lying in the discretion of a superior court or the direct appointment of a special jurisdiction by the law.

In France, for instance, when a member of the legal service is accused of an offence, the Criminal Division of the Court of Cassation appoints, on an application by State Counsel, the Indictments Chamber which is to conduct the preliminary investigation (Article 681 of the Code of Criminal Procedure) and makes all judicial decisions during the investigation. The trial court must not be the one in which the accused member of the legal service performed his functions.

Similarly, in Italy, Article 60 of the Code of Criminal Procedure provided that this matter should be decided by the Court of Cassation; as it appeared that this power of the court was contrary to the principle that a person should be tried by a judge specified by the law (Article 25 (1) of the Constitution, "No one shall be tried otherwise than by a judge previously specified by the law"), section 1 of Act No. 879 of 22 December 1980 has made new rules governing the subject: the present position is that if according to the ordinary rules jurisdiction would be exercised by the Judge's Council (ufficio giudiziario) to which the accused judge belongs, the case will be tried at the same level in the principal town of the nearest adjacent district.

III. Civil liability

1. As regards civil liability the possible solution depends not only on the need to guarantee the judge's independence in the exercise of his functions by protecting him from actions for damages by litigants but also on the desirability of avoiding as far as possible any interaction between the principle of res judicata and the effects (including the indirect effects) of accepting a claim for damages based on the negligence of a judge and the injustice of the judgment. Because it must be clearly stated that we are here principally concerned with liability for faults committed by a judge in performing judicial acts and in particular in his judgments.

It is true that opinions vary with regard to the concept of a judicial act; everyone agrees, however, that a decision deciding a dispute between the parties (a judgment) falls within the definition and a number of legal systems also consider as judicial all acts by a judge preparatory to making a decision in legal proceedings. At all events, the problem of the independence and the liability of the judge is raised in connection with all acts which the law gives him jurisdiction to perform by reason of his impartiality.

It must also be stressed that the fault affects the act in its origins and it is impossible to speak of a judge's liability with respect to acts performed lawfully and without fault although they may be objectively unjust. Furthermore it is very difficult to give a precise definition of an unjust or erroneous judgment because the interpretation of legal rules and the reconstruction of the facts of the case always leave a considerable grey zone of uncertainty.

The solutions which legal experience has suggested may be classified as follows:

As regards substantive law:

a. there is no provision for liability or liability is limited to the civil effects of a possible criminal conviction;

b. liability is only provided for harm intentionally caused to the parties;

c. liability also covers faults arising out of the judge's negligence or ignorance.

As regards the person liable:

a. the judge alone is liable to the injured litigant;

b. official liability exists alongside that of the judge;

c. the State is directly liable for the judge's faults subject to an action in indemnity against the judge.

As regards procedure:

a. no special form is provided and the procedure is governed by the general rules;

b. previous authorisation is necessary;

c. the jurisdiction and procedure are governed by special rules.

2. In this respect the greatest difference is that existing between the Common Law countries and the other countries of Europe; it must be said that among all the theoretically possible combinations the United Kingdom provides an example of almost absolute negation of judicial liability.

The fact is that the Napoleonic legislation had practically no influence in England, and its judicial system has developed along very different lines to those of continental Europe. In particular there is no judicial career as we understand it: ie regular guaranteed promotion for a judge through the grades of a hierarchy. The judges of the higher courts are appointed by the Queen on the advice of the Lord Chancellor or the Prime Minister; other judges are also appointed by the Queen on the recommendation of the Lord Chancellor to whom an application is made by the local authorities. The members of the Attorney General's department are not drawn from the same legal service.

Although to the continental observer this system may appear to ignore the principles of the separation of powers, judicial independence is based on a firmly established tradition. The judge's first guarantee, ie the right to remain in office during good behaviour, has been established since 1648. The declaration of the independence of the judiciary, in particular in the Act of Settlement of 1701, was followed by the detailed definition of this guarantee in the Judicature Act of 1875 and the Consolidating Act of 1925: these provide that the Queen may not dismiss a judge of the higher courts except on a resolution of the two Houses of Parliament; guarantees of tenure of office are at present established even for the other judges and magistrates.

It is obvious that the system relies principally on the wisdom of the Lord Chancellor and the good faith of those operating it and that its working depends on the force of tradition, a certain degree of homogeneity in society and the general acceptance of the authority of the judges. It is therefore not surprising that the Common Law has no provision for the civil liability of the judge with respect to his judgments: no action may be brought against a judge for anything said or done in the exercise of his jurisdiction. This immunity covers orders given and judgments pronounced even if they are based on a gross error or the result of ignorance, envy, hatred or malice; provided that the judge observes the limits of his jurisdiction or, if he has exceeded it, that he has not done so intentionally. The only remedy therefore against the injustice of a decision is an appeal to a higher court if an appeal lies.

3. The other European countries have been much more influenced by the Napoleonic legislation. The French Revolution, the Consulate and the Empire marked a clear break between the ancien régime and its system, based on private ownership of judicial office and the new concept of a citizen's judicial service for the citizens, a typical function of the State and an expression of the separation of powers between the legislative and the executive.

The legislative policy of the Empire, once the experiments with elected judges and arbitration had been abandoned, set up a system whose main characteristic is the fact that the judges are civil servants although they enjoy a special status; they soon provided for Europe a model that was easily copied and which has for a long time dominated judicial organisation. Given the existence of a body of judges organised on hierarchical principles it has become almost impossible to conceive of the judge's liability on the same footing as that of someone exercising an independent profession; restrictions have been imposed both as regards the substantive conditions of liability and on the bringing of actions by litigants in order to protect the judges and discourage the parties.

Already under the ancien régime there existed a rather special form of judicial liability. Confronted by the parliaments who claimed the right to control the sovereign's power, the monarchy tried to use the action for misuse of authority (prise à partie) against the judges and to solve the conflict by declaring "null and void" judgments and appeal judgments contrary to royal edicts and decrees and by permitting litigants to bring an action in damages against the judges who had made these decisions (Louis XIV: Order of April 1667): the power of the parliaments and the instruments provided by their case law soon overcame this obstacle. There were no parliaments to trouble the Empire so it resuscitated the action for damages for misuse of authority which it used indirectly to complete its system for controlling the judiciary. Negligence by a judge, however, even gross negligence, retained its former immunity.

Moreover, it is unlikely that those who drafted the 1806 Code of Civil Procedure (Article 505 (1)), all of whom accepted unconditionally the myth that the judge is "the mouthpiece of the law", were disturbed by the problem of the negative effects of possible liability for negligence (even gross negligence) on the development of case law: because it is clear that the possibility of being held liable for an error in the interpretation of legal rules does not encourage a judge to depart from precedent.

In France, the problem of the civil liability of a member of the legal service arises both for judges and State counsel; for it is a specific feature of French judicial organisation that State counsel (who are nevertheless subordinate to the Minister of Justice) are considered members of the judiciary.

Until 1933 civil liability was limited to cases of deliberate misfeasance, fraud and extortion as provided in the 1807 Code of Civil Procedure and, in the case of judges' only, denial of justice. This last case could not concern State counsel because the bringing of prosecutions was not and is not mandatory.

The concepts of deliberate tort and fraud may be interpreted as referring to the intention of a judge who deliberately makes a decision contrary to justice on grounds of favour or ill-will or personal interest. The concept of extortion, as regards France, has been expressly defined in Article 174 (1) of the Criminal Code (the act of a judge who receives, demands or orders the collection of fees, taxes, wages or salaries which he knows not to be owing).

The Act of 7 February 1933 has added to the above cases grave professional negligence: ie a fault committed by virtue of "so gross an error that it would not have been committed by a normal conscientious judge", particularly gross negligence or an inexcusable failure to comply the duties essential to the exercise of judicial office.

Until 1972 it was possible to make a judge personally liable by initiating special proceedings under Articles 505 et seq of the above-mentioned Code: ie the action for misfeasance (prise à partie) which was sufficiently cumbersome and complicated to discourage litigants. As regards jurisdiction, if the liability of a judge or court of first instance or a judge of a court of appeal was concerned, the action for misfeasance was brought in the court of appeal; if the liability was that of a court of appeal or one of its divisions or a judge of the court of cassation the action was brought in the court of cassation. The proceedings had to be authorised by the president of the court having jurisdiction and were conducted in two stages, a preliminary judgment on admissibility of the action followed by a second judgment on the merits: the two judgments were given by two separate divisions of the court. An unsuccessful plaintiff could be ordered to pay damages; on the other hand, if he was successful his damages were guaranteed by the State.

The action for misfeasance served as a model for proceedings to enforce liability in other European countries (eg the Duchy of Luxembourg) although the need to protect judges against unmeritorious actions by litigants has also produced more flexible solutions. In France resistance to this complicated procedure led to the Act of 5 July 1972 which prepared the reform later effected by the Administration of Justice Act of 16 March 1978 (section 781-1) and the Institutional Act of 18 January 1979 (modifying paragraph 11-1 of Order 58-1270 of 22 December 1958). At present, as the State is liable to make good damage suffered by the malfunctioning of the courts and this public liability arises by virtue of serious negligence by a judge or a denial of justice, litigants are no longer able to bring an action for malfeasance against the judge himself. The latter is only liable for his personal fault not connected with the exercise of his functions; he is only liable on an action

for indemnity by the State before a court of the civil division of the court of cassation for faults connected with the exercise of his judicial functions. These rules, however, only refer to the judges of the ordinary courts; the provisions of Article 505 et seq of the Code of Civil Procedure relating to the action for misfeasance still govern the liability of the judges of the specialised courts (eg industrial tribunals).

The present system certainly guarantees that the litigant receives compensation while at the same time protecting judges from legal actions on the part of the former. However, a neutral observer may ask whether the discretion exercised by the Executive in deciding whether to bring an action for indemnity does not perhaps constitute a more serious risk to the independence of the judges than the possibility of an action being brought by a litigant.

4. The idea of direct and exclusive State liability for damage caused by the gross negligence or intentional misfeasance of a judge was not, however, unknown in Europe. Under Article 34 of the Basic Law of the Federal Republic of Germany liability for damage caused by a public officer (according to the generally accepted interpretation this includes a judge) who commits a breach of his duties is borne directly and exclusively by the State.

It should be mentioned that Article 839 of the Civil Code, which in general accepts liability for such damage, applies special limitations in the case of judges. In the case of damage caused by a judgment, liability only exists if the breach of duty in question renders the judge liable to a criminal sanction (ie if he has been guilty of corruption or criminal misfeasance: this limits liability to cases of intentional misfeasance); the tendency of courts is to extend the concept of decision. In cases of damage caused not by a decision but by other functions exercised by the judge, liability exists in case of intentional misfeasance or gross negligence, provided that no other legal channel for obtaining compensation is still open to the injured person and that he has not been negligent in failing to take such proceedings.

The rules governing a judge's civil liability are the result of a combination of these two provisions. The State, which is directly liable to the litigants, has an action in indemnity against a judge; however it seems that it very seldom makes use of it.

An Act of 26 June 1981 introducing more extensive public liability was declared void by a judgment of the Federal Constitutional Court of 19 October 1982.

5. Under Article 127 (2) of the Constitution of the Kingdom of Spain, promulgated on 29 December 1978, the independence of the judiciary shall be guaranteed by law and Article 1 of the Institutional Act No. 1 of 10 January 1959 states that independence is one of the principles governing the organisation and exercise of judicial power. I do not know if, and in what way, the principle of independence has affected the rules governing the criminal and civil liability of judges in the Spanish Criminal Code and Code of Civil Procedure.

Article 903 of the Code of Civil Procedure incorporating the wording of Article 355 of the Criminal Code confirms that judges and justices of appeal (magistrates) may be held civilly liable for the violation of the law in the exercise of their judicial functions by reason of negligence or inexcusable ignorance; gross negligence thus renders both criminally (for misfeasance) and civilly liable, which seems to be a provision found only in Spanish law.

As the judge cannot be held liable unless all other remedies have become impossible the injured person is not allowed to commence his action before the proceedings which are the cause of the damage have been decided by a formal order (Article 904); nor is he allowed to bring his action if at the proper time he failed to avail himself of the remedies provided by law (Article 906). This action is subject to a preclusive time limit of six months).

The action is governed by the ordinary rules; jurisdiction, however, is conferred on the court immediately superior to that to which the judge whose liability is at issue belongs. Thus, where a judge of first instance is concerned, the case comes before the court of appeal (Audiencia) and a possible appeal lies to the court of cassation (Tribunal Supremo). On the other hand, as jurisdiction to deal with proceedings against a justice of appeal lies with the court of cassation (IIIrd Division: Article 913), no appeal lies against the decision; similarly, an action against a judge of that court will be heard without any possible appeal by the court itself sitting as a "Chamber of Justice" with all the judges on the bench. It should be stated that the judgment on the liability of the judge has no effect on the decision to which the fault and the liability refer (Article 917).

6. In substance, the Italian solution to the problem is not very different from the original wording of Article 505 of the 1807 Code of Civil Procedure. Article 55 of our Code (Royal Decree No. 1443 of 28 October 1940) makes a judge liable for intentional misfeasance, fraud or extortion in the exercise of his functions or for a kind of denial of justice if he refuses, omits or delays without good reason to perform an act pertaining to his office when called upon to act by the party concerned. Article 55 states that this is the case when the party has made a formal application to obtain a decision or other act to which he is entitled and ten days have elapsed without action being taken.

In Italy State counsel are also members of the judiciary; they have practically the same rights and duties as a judge; they are not dependent on the Minister of Justice and enjoy the same guarantees of independence as those conferred on the judges; thus they are liable for acts done in exercise of their functions in the same way as judges. However, Article 74 of the Code of Civil Procedure, which relates specifically to State counsel acting in civil proceedings, in referring to Article 55 for all matters relating to liability, seems to import a restriction as it mentions deliberate misfeasance, fraud and extortion but does not mention the failure to do acts forming part of their duties.

In this connection it should be pointed out that in Italy the bringing of prosecutions is always mandatory for the Chief State Counsel's Department and the same applies in certain cases to civil proceedings. These cases are,

however, very exceptional, which explains the silence of Article 74. And seeing that Article 328 of the Italian Criminal Code punishes as a misdemeanour the failure or refusal (in this case, of course, intentional) by a public officer to perform acts required by his function, this silence is of little importance since a criminal conviction can involve liability for tort although outside the scope of Article 74.

Moreover, all the limits imposed by Articles 55 and 74 of the Code of Civil Procedure do not affect either the action which the party concerned may bring during criminal proceedings or the civil action normally brought after a criminal conviction (Article 56 (3)).

As regards procedure, the Italian solution, which is less complicated and cumbersome than the action for misfeasance in the 1807 Code, is also designed to protect the judge from unmeritorious actions by litigants; on the other hand it cannot be said that it is designed to discourage plaintiffs. Under Article 56 (1) of the Code of Civil Procedure the plaintiff must first apply for authorisation to the Minister of Justice and having obtained it he must apply to the court of cassation for the appointment of the competent court: it is not possible to have the case decided by the Judges' Council (ufficio giudiziario) of which the defendant is a member. Finally, the action is governed by the ordinary rules of procedure.

It is certainly unusual that Article 56 gives the Minister of Justice the power to authorise the proceedings: according to the logic of the judicial system one might have expected jurisdiction to be given to the Judicial Service Commission on which the Constitution has conferred all powers relating to the status of judges. However it must be remembered that the Executive is interested in actions brought against judges because Article 28 of the Constitution provides that the State is directly liable for acts performed by public officers which violate individual rights. This is not a mere guarantee because the State's responsibility is based on the consideration that an act by a public officer performed in the exercise of public authority is directly imputable to the State itself.

The question remains open. From the constitutional point of view the need for authorisation by the Minister is probably incompatible with the principle of the independence of the judiciary (Articles 101, 102, 104 and 105 of the Constitution) because firstly Article 6 gives the Minister a power over the judge and secondly it gives the Minister a function which affects the administration of justice. It also appears incompatible with the principle stated in Article 24 (1) of the Constitution which guarantees everyone the right to take legal proceedings to protect their rights, because in this case the litigant's action depends on the exercise of a discretion by the Minister.

Actions for damages against judges are in fact very rare because litigants claiming to be injured by the act of a judge prefer to take proceedings against the State. A judgment of the Constitutional Court of 14 March 1968 (No. 2) confirms the constitutionality of the system which, while placing limits on judges' liability, does not exclude it entirely, and which, at all events, permits an action in damages to be brought directly against the public administration. As the case was brought against the State alone, the

court pointed out that it was unnecessary to consider the question of the constitutionality of Article 56, which was not relevant to the proceedings. A decision of the court of cassation of 24 March 1982 has subsequently dealt with a question scarcely touched on by the constitutional court in the above-mentioned decision and found that the State was liable under Article 28 of the Constitution in a case where a judge had committed gross negligence: this did not, however, relate to a formal decision but involved very serious negligence during an investigation and the damage was caused not to a party but to an assistant.

To conclude this review of the judge's civil liability in Italy it seems sufficient to recall the connection between the unjust decision giving rise to the liability and the judgment which terminates the litigant's action (for intentional malfeasance, fraud or extortion) under Article 55 (1): if a judgment which finds that the judge has committed misfeasance has become final Article 395 No. 6 of the Code of Civil Procedure makes it possible to apply for a retrial of the proceedings leading to the decision obtained by means of this malfeasance.

In Italy the balance of interests in the situation I have just described is no longer considered ideal. Public opinion has been troubled from time to time by certain excesses and support has been gathering for the idea that the provision of less limited personal liability for judges might improve the judicial service. It has thus been suggested that they should be made liable for gross negligence and that the concept of acts performed in the exercise of judicial functions should be more widely defined because the duties of judges are not exclusively judicial.

The concern to prevent unmeritorious actions or actions brought solely to exercise pressure seems to confirm that the changes in the rules relating to liability would maintain the limiting requirement of prior authorisation; this discretion, however, would not be exercised by the Minister, ie the Executive, but rather by the Judicial Service Commission. On the other hand, as public opinion does not seem very enthusiastic about the working of the judicial system, it is unlikely that a scheme to substitute State liability for the direct personal liability of the judge on the French model would find many supporters.

IV. Disciplinary sanctions

1. Disciplinary sanctions do not provide compensation to litigants who have suffered injury on account of an act or behaviour on the part of a judge who commits a breach of his duties; nevertheless, effective disciplinary control of judges is intended to prevent negligent or unlawful conduct and so to improve the general standard of the judicial service.

Disciplinary control seems, conceptually, to imply a special relationship between a person and his superior authority so that it would seem to be incompatible with the principle of independence. However, the European tradition has long accepted disciplinary control of persons exercising a profession by the professional association either to sanction misconduct by members of the association, who are judged by their peers, or with the object

of enabling the professions to work out specific rules of professional conduct. However, the liability in this case does not cover the specific content of acts which constitute the subject-matter of professional activity so that it does not constitute a threat to the professional man's independence in this respect. Membership of an organised body thus seems essential to disciplinary control whatever the nature of the relationship between the person in question and the body concerned.

As regards judges this condition is satisfied in a very different way in the various countries of Europe.

In the United Kingdom the only rule accepted by the organisation of the administration of justice is the independence of the judge: on nomination he is appointed to a specific office which he has the right to retain until the age of 75 or 72; it is true that he may be reprimanded in private by the Lord Chancellor and he may also be dismissed for misconduct or incompetence; but these are measures which do not affect his status so long as he continues to exercise his functions.

This does not, therefore, constitute a genuine disciplinary system; the corrective nature of the first measure and the punitive nature of the second are nevertheless obvious.

We have already mentioned that the judges of the superior courts cannot be dismissed by the Queen except on a resolution of both Houses of Parliament. As regards the other judges reference must be made to the Lord Chancellor's powers under the Courts Act 1971. The procedure for dismissal guarantees the person concerned the right to be informed of the subject-matter of charge and to be heard.

As regards countries where the judicial organisation is based on a body of judges who are public officers, this original weakness of the system implies that all faults committed in the service and the exercise of one's functions are punished as well as all breaches of duty which affect the honour, reputation and dignity of the office; naturally an erroneous or unjust judgment is not generally speaking a disciplinary offence even though it has been cancelled, modified or set aside because this would amount to an unacceptable control of the administration of justice.

It is clear that there is a connection between making provision for a judicial career within a hierarchically organised body and the development of a disciplinary system: on the one hand, every organised body tends to defend its unity and guarantee its homogeneity; on the other, a strictly regulated judicial career raises the problem of the relationship between the members of the judiciary as regards the promotion of each individual. There is therefore a possibility (or indeed the risk) that imposing disciplinary sanctions becomes an instrument for indirectly limiting the independence of the judge as it offers the organised body a means of pressure through the effect of sanctions on the expectation of promotion, or indeed, the possibility of remaining in office.

I think that the criteria of a disciplinary system are the designation of the court competent to decide on the faults committed by judges and impose sanctions and the conferring of the power to initiate proceedings on a particular person.

Theoretically numerous alternatives are available. It is a question of striking a balance between the principle of separation of powers and the requirement of not making the judges a completely separate body (because it must be remembered that others too are interested in a sound administration of justice). Moreover, nowadays the State seems to be rejecting the traditional concept of the separation of powers and seeking to establish arrangements which imply a certain connection between the judiciary, the executive and the legislative.

In Europe the position varies considerably from State to State.

We have already seen that the UK solution, although not amounting to a real disciplinary system, is based, at least as regards the judges of the superior courts, on the Queen's power, subject to the opinion of both Houses of Parliament. The other European countries have followed a completely different line; as a rule they have stressed the separation of powers by adopting judicial type procedures and have situated the disciplinary courts within or alongside the judicial organisation, though sometimes reserving to the Executive the right to initiate proceedings either directly or through the Chief State Counsel's department.

It is true, however, that the choice of a judicial procedure has generally been imposed by the nature and importance of the rights which may be reduced or adversely affected by imposing a disciplinary sanction so that, in fact, several countries have guaranteed the protection of legal proceedings not only for judges but for all public employees.

In the Federal Republic of Germany the subject is regulated by the Judges Act of 8 September 1961 and the Disciplinary Codes issued by the Federation and the Länder.

The history of disciplinary proceedings in Germany reveals the detailed specification of the judges' duties and disciplinary offences: already in the 18th century Frederic II succeeded where the King of France failed, ie in imposing on the judges a disciplinary system based on very detailed rules. Nevertheless, the German system does not provide a complete definition of disciplinary offences. The independence of the judges is nevertheless sufficiently guaranteed because disciplinary liability does not affect the content of decisions or supporting measures. On the contrary, the judge is only liable for faults committed in relation to the other duties of his office, which are easily identifiable as the duties imposed on him as a public officer (punctuality, correct behaviour to the parties etc). Furthermore, the judge is always permitted to draw attention to the possible effect of a disciplinary measure on his independence (Judges Act, section 26). It should also be pointed out that a judge, being subject only to the law, may not receive directives on any matter relating to the exercise of his jurisdiction.

The disciplinary sanctions are very varied, including corrective measures such as a reprimand or non-criminal fine or a disciplinary transfer, or sanctions involving removal from judicial office such as dismissal. However the judges of the higher federal courts can only be punished by a reprimand, fine or dismissal.

The strongest guarantee of the judge's independence is the fact that the disciplinary authorities form part of the judiciary. The disciplinary control exercised by the superior authority includes the power to reprimand the judge and call for a better performance of his duties. The judge himself has the right to call for formal proceedings which are always necessary for the application of more serious sanctions.

A court with special jurisdiction (Dienstgericht) decides in the first place on the commencement of proceedings and the adoption of provisional measures (suspension from office, reduction of salary) and their possible revocation. An appeal is provided in the case of proceedings against judges of the Länder courts; in the case of the judges of the superior federal courts, jurisdiction is exercised by a section of the federal court, whose decision is final.

A special case of liability is provided for in Article 98 of the Basic Law. A judge who has violated the fundamental principles of the Constitution may be impeached by Parliament before the Constitutional Court and with a special majority the court may remove him from office or order his retirement. It should be mentioned that under Article 92 of the Basic Law the Constitutional Court is itself a judicial body and that its members, by virtue of their election by the two Houses of Parliament and special guarantees of their status, are independent. The procedure is regulated by Constitutional Court Act of 12 March 1951 (section 58 which refers to section 49). The link between the judiciary and the legislature is effected on the initiative of parliament: after deliberation by the Assembly, the Speaker draws up the indictment which a delegate of the same Assembly argues before the court. This is a special procedure for an exceptional case; it is perhaps doubtful whether it constitutes a disciplinary proceeding since the object seems to be rather the solution of a problem of constitutional balance rather than the punishment of a judge.

2. In France the Third Republic reserved jurisdiction in disciplinary matters for the court of cassation, the highest organ in the judicial system. The Constitution of 1946 which established a different balance between the various powers of the State set up the Judicial Service Commission, and conferred this function as well as other functions relating to judges on it: the disciplinary tribunal for judges was thus placed outside the organisation of the ordinary courts. This change did not go uncriticised: the members of the Judicial Service Commission were chosen by the President of the Republic who, together with the Minister of Justice, attended its meetings, a fact which could raise doubts as to the real separation of powers and the impartiality of such a disciplinary tribunal.

The Constitution of 4 October 1958 confirmed the jurisdiction in disciplinary matters of the Judicial Service Commission as regards the judges (Articles 64 and 65); its composition and powers were governed by Order 58-1271 of 22 December 1958. This established a commission of nine members appointed by the President of the Republic (three members of the court of cassation and three judges of the courts of first instance and appeal chosen from a list prepared by the office of the court of cassation; one judge of the Conseil d'Etat chosen from a list of three names submitted by

the Ordinary General Assembly of the Conseil d'Etat; and two persons who were not judges). In carrying out its administrative duties, the Judicial Service Commission is presided over by the President of the Republic and the Minister of Justice is the Vice-President; when it is acting as a disciplinary tribunal for judges (and thus exercising a judicial function), the President of the court of cassation presides; the President of the Republic and the Minister of Justice do not attend its sittings in this case.

Although French judges sometimes complain that the judiciary does not participate in the appointment of the members of the Judicial Service Commission, the system seems to guarantee their independence; and the possibility of an appeal to the court of cassation against the decisions of the Judicial Service Commission (owing to their judicial nature) is a further link connecting it with the judicial system.

The commencement of disciplinary proceedings is, however, a matter for the Minister of Justice: it is he who under paragraph 50 of Order No. 58-1270 reports to the Judicial Service Commission the facts justifying disciplinary proceedings against judges; it is he who sends to the President of the court of cassation the file relating to the judge concerned and the documents relating to the case; it is he, again, who in urgent cases can forbid the judge concerned to exercise his functions until the final decision, but only on a proposal from the accused judge's official superiors and after taking the commission's advice (paragraph 47). He is, however, excluded from any investigation of the case, which is conducted by a Rapporteur appointed by the commission; the only representative of the Executive before the commission is the Director of Judicial Services and provision is made for him to be heard on the day fixed for the oral proceedings (paragraph 51). Paragraph 58 of Order 58-1270 correctly states that disciplinary power as regards judges is exercised by the Judicial Service Commission, which in fact controls the entire proceedings.

As regards State counsel, since they constitute a hierarchically organised body under the directions of the Minister, disciplinary sanctions are applied by the Minister himself on the advice of the disciplinary commission for State counsel (paragraph 59). This body is sufficiently representative of the various hierarchical levels of the members of that department. The Minister's powers are thus limited because he cannot impose a sanction on the officer concerned if the disciplinary commission is of the opinion that no fault has been committed in the case; he can, however, submit the question to a special board set up in the court of cassation, whose decision is binding.

The act by which the Minister of Justice applies the sanction does not appear to be a judicial act; and an appeal lies to the Conseil d'Etat. The power conferred on the Minister is obviously due to the fact that in France the Chief State Counsel's Department is dependent on him; and it is probable that the fact that State counsel are to a considerable degree represented on the disciplinary commission (to a greater extent than judges on the lists for the appointment of members of the Judicial Service Commission) was due to the desirability of limiting the power exercised by the Executive.

Finally, the procedure gives both judges and State counsel the same procedural guarantees: making the file available for inspection as soon as the case comes before the Judicial Service Commission (or the disciplinary commission for State counsel), the right to be assisted by a colleague or by a barrister and the right to inspect the relevant documents at least 48 hours before the hearing (paragraphs 51, 52 and 63 of Order No. 58-1270).

In this system, in view of the large variety of sanctions (reprimand, transfer, withdrawal of certain functions, reduction of increment, reduction in grade, compulsory retirement and dismissal with or without suspension of pension rights), the absence of a prior legal definition of the disciplinary offences cannot be considered as a threat to the independence of members of the legal service. This defect could, however, cause some difficulties. The wording of paragraph 43 of Order No. 58-1270 is in fact very wide with respect to both judges and State counsel because it includes not only faults in connection with the duties of one's office but all faults concerning the duties of one's status including those likely to affect the honour, reputation and dignity of the profession. This seems to open the way for disciplinary control extending even to private life as a member of the legal service never ceases to be an office-holder.

3. The disciplinary system of the Kingdom of Spain is regulated in a very detailed fashion: a better and more detailed definition of disciplinary offences is matched by the various types of sanctions, jurisdiction to impose which lies either with a number of bodies within the court system or with the Judicial Service Commission and its disciplinary section.

The Judicial Service Commission was established by the Constitution of 29 December 1978 and regulated by Institutional Act No. 1 of 10 January 1980: it is external to the courts' system and at the same time governs and represents the judiciary; like the corresponding commissions in France and Italy it is of mixed composition, and like the latter is characterised by its complete independence of the Executive. Twelve of its members are directly elected by judges of all categories; the other eight members are appointed by both Houses of Parliament from among lawyers and jurists; the President, who is also President of the Supreme Court, is appointed by the King on the proposal of the plenary commission.

The disciplinary section is an organ of the commission (section 26 of the Institutional Act) and reflects its composition, one judge of the Supreme Court, one judge of the courts of appeal, a judge of the courts of first instance and two lay members).

The establishment of the commission and its disciplinary section have in fact changed the system, which nevertheless retains certain features going back to Part XIX of the Institutional Act governing the judiciary of 15 September 1870 (as amended by the Act of 20 December 1952). The power to impose disciplinary sanctions is still exercised by a number of different organs, consisting of one or more individuals depending on the nature of the sanction: the Presidents (of the Supreme Court, the central labour court and the courts of appeal) can impose sanctions such as a warning or caution on

justices of appeal or judges subject to their authority; the councils of the presidents of the same courts (Salas de gobierno) can impose the sanctions of a simple reprimand or a fine; the disciplinary section of the Judicial Service Commission can impose more serious sanctions such as a serious reprimand, delaying promotion, stopping of salary and suspension from the service; finally the full Judicial Service Commission can impose the very serious sanctions of termination of office and dismissal. The unity of the system would, however, seem to be guaranteed by the jurisdiction of the disciplinary section to deal with all appeals against the decisions of the presidents and of the Salas de gobierno while the full Judicial Service Commission hears appeals against first instance decisions of the disciplinary section.

The forms of procedure (summary in the case of fines and lesser sanctions and formal in the case of more serious sanctions) provide the guarantees of an opportunity of answering the charge and a hearing for the accused; however, owing to their inquisitorial nature and the authorities involved they must be classified as administrative decisions; an appeal therefore lies to the Supreme Court in accordance with the procedure governing administrative cases.

4. I have neither the authority nor the necessary experience to criticise the disciplinary systems of other European countries, but will nevertheless attempt, by describing in rather less summary fashion the characteristics of the Italian institutions, to bring out the differences and measure the advantages and disadvantages.

Like France, Italy decided to place the disciplinary court for judges outside the organisation of the ordinary courts and maintain a very clear separation between the right to commence proceedings and the actual proceedings of the disciplinary court. Nevertheless, the resulting balance of power between the judiciary and the Executive is very different.

The Constitution of the Republic of Italy, which was promulgated on 27 December 1947, deals with the judiciary in Part IV (Articles 101 to 113). The solemn pronouncement of the independence of the judiciary (Article 101 (2): "Judges are subject only to the law") is followed by the principle of the separation of the judicial power (Article 104 (1) "The judiciary is autonomous and independent and not subordinate to any other power"). These formal guarantees of independence and autonomy are matched in the same Article 104 and the following articles by the establishment of a Judicial Service Commission, on which is conferred the power to make all administrative decisions relating to judges (appointments, nomination to office, transfers, promotions and disciplinary measures); provision is also made in outline for its composition.

The resulting system is characterised by the complete independence of the judges and the judiciary both of the Executive and of the legislature.

The Chairman of the Judicial Service Commission is the President of the Republic whose high functions cannot be classified as part of the Executive. The powers of the Minister of Justice with regard to the judges are practically non-existent and he himself is not a member of the Judicial Service Commission.

The President of the court of cassation and the Chief State Counsel attached to that court are members by virtue of their office and two-thirds of the other members are judges directly elected by their colleagues.

As regards the legislature, the fear that the autonomy of the judiciary would lead to the formation of a separate body was the reason for reserving to parliament the right to elect the other members from among university law professors and barristers who have practised for at least 15 years.

The majority in the Judicial Service Commission is thus reserved for members of the legal profession and the independence of the lay members is also ensured, because although elected by parliament they are not required to give an account of the manner in which they exercise their functions.

It is clear that the jurisdiction conferred on such a Judicial Service Commission under Article 105 of the Constitution with regard to disciplinary matters imports a guarantee that this duty will be exercised in complete independence.

As the Constitution of the Republic is not a "flexible" constitution, the system has developed by using the gaps left by the constitutional guarantees, ie it has concentrated on the number of elected members and the machinery for their election. It is impossible to understand this development if one is not aware of the tensions which affected the Italian judiciary during this period.

The previous régime, between the two wars, had gradually strengthened the hierarchical principle. Although, even under the Fascist régime, the Italian judiciary had always retained a certain independence, it was organised entirely on hierarchical principles. The organisation of the offices and functions at different levels of jurisdiction was matched by a similar organisation of promotion by providing for various grades, ie a pyramid at the top of which we find the President of the court of cassation. The judges of this court were thus at the same time judges of appeal of last instance and the aristocracy of a sort of judicial army. Their power within the judiciary was based on a system where promotion depended on merit according to the assessment of committees of which they were members. Discipline was exercised by the Minister of Justice after consulting a disciplinary court whose members were also chosen among high-ranking judges.

It is obvious that although the Constitution itself had provided an ideal solution to the problem of the autonomy of the judiciary vis-à-vis the other powers, it was nevertheless necessary to achieve a guarantee of independence for the judges within the judiciary itself. The judges and their national association therefore soon attempted to give practical form to the constitutional principle (Article 107 (3)) that no distinction should exist between judges except by reason of the functions they exercised and that, as regards the composition of the Judicial Service Commission and its disciplinary section, the number of members of the court of cassation should be reduced.

However, under Act No. 197 of 24 March 1958 the disciplinary section of the Judicial Service Commission was made up of six members and four substitutes; the members included, alongside three lay members, the President and four judges of the court of cassation but only one justice of appeal and one judge of first instance represented these much more numerous categories. These proportions did not even correspond with the composition of the Judicial Service Commission itself (six members of the court of cassation, four justices of appeal and four judges of first instance). The criticism was thus directed towards the composition of this body which did not fairly represent the various categories of judges and against the attribution of disciplinary jurisdiction to the section and not to the full commission as required by Article 105 of the Constitution. Questions of constitutionality were raised but rejected by the Constitutional Court in its judgment No. 168 of 23 December 1963.

However, from the political angle the question remained open and Act No. 1198 of 18 December 1967 altered the composition of the section: the number of members was increased to 15 including four lay members, one of whom was the Vice-Chairman of the Judicial Service Commission, and the President of the court of cassation was excluded. Among the 11 professional members, five judges of the court of cassation, three justices of appeal and three judges of first instance represented the various categories. For disciplinary proceedings, however, the board was composed of only nine judges (three lay judges, three judges of the court of cassation and three justices of appeal or first instance chosen by lot); a constitutional appeal was again brought and the Constitutional Court by its judgment No. 12 of 2 February 1971 held that the provisions relating to the composition of the board were unconstitutional. Since 1971, therefore, disciplinary proceedings have been dealt with by the disciplinary section sitting as a bench of 15 members.

Finally Act No. 1 of 3 January 1981 seems to have provided an acceptable solution. As an Act (No. 695 of 22 December 1975) had altered the composition of the Judicial Service Commission (increasing the number of elected members to 20 judges and six lay members), it was possible to constitute the disciplinary section with the same proportion of members in each category as the full commission and at the same time reduce the number of the judges from the court of cassation. At present the section consists of nine members (three lay members including the Vice-Chairman of the commission, two judges of the court of cassation, a justice of appeal, two judges of first instance and one further judge who may be of any category) and seven substitutes; with the same composition of nine members it investigates and tries cases and gives its decisions.

It should, however, be stated that in the meantime the structure of the judiciary has completely changed: the majority system for the election of judges to the Judicial Service Commission has been abandoned (Act No. 695 of 22 December 1975) and the members of the commission and its disciplinary section are elected by a single national body with no distinction of category with the result that they are chosen less because they are members of a particular court than by virtue of the position they occupy in the ideological spectrum of the judiciary. It is not easy to identify the consequences of this change.

It may well be that the proportional system chosen for the election of judges to the Judicial Service Commission has increased the influence of organised groups within the judiciary and also their influence on the commission itself and its disciplinary section. In fact, it appears that the new composition has led to a sharper exercise of disciplinary power although ideological conflicts have raised some problems. It also seems that the ideological influence in the appointment of its members has strengthened the commission's tendency to extend its powers. With regard to disciplinary proceedings, this tendency has become apparent on the practical level in the information given by the commission to those entitled to bring proceedings with a view to their doing so in particular cases; and by the emergence of a movement of opinion among judges and politicians that the right to commence disciplinary proceedings should be controlled by the section.

5. This tendency is at present arrested by a procedural bar, ie the very clear separation between the right to bring the proceedings and the proceedings themselves and between those entitled to bring proceedings and the disciplinary section of the commission. The Constitution (which in Article 112 lays down the principle of compulsory prosecution) speaks in Article 107 (2) of the right, and not the duty, of the Minister of Justice to bring disciplinary proceedings; it is obvious that this right and its exercise involve the Minister's political responsibility for the exercise of his discretion in this respect. Paragraph 29 of the Royal Legislative Decree No. 511 of 31 May 1946, which provides the specific cases in which proceedings are mandatory, implicitly confirms that they are normally discretionary. In the resulting system the balance rests on two separate powers exercised respectively on the one hand by those entitled to bring proceedings and on the other by those who try the case.

The constitutional provision conferring the right to bring proceedings on the Minister indirectly confirms the impossibility of bringing disciplinary proceedings against judges by reason of the content of their decisions and more generally of choices made in the exercise of their judicial functions; as the Minister has no powers in relation to these choices (he only has the political power and responsibility for the organisation of the judiciary and its departments), he cannot complain to the disciplinary section about the way they are exercised.

Under Article 107, mentioned above, the Minister's right to take proceedings is obviously contained in a guarantee, and is not a constitutional reservation of power to the Minister.

Paragraph 27 of the Royal Legislative Decree No. 511 of 31 May 1946, as amended by section 14 No. 2 of Act No. 195 of 24 March 1958, confers the same power on the Chief State Counsel attached to the court of cassation. Although from time to time judges against whom proceedings are taken express doubts as to their constitutionality the general opinion is that these doubts are unfounded (Cons. Sup. Mag. 28 May 1974, proc. n. 257; cass. civ. 13 December 1975, n. 743, ord.). The fact that the power is conferred both on the Minister and the Chief State Counsel ensures a better protection of the requirements of the judiciary because the Minister is inclined to bring disciplinary proceedings principally on political grounds whereas the Chief State Counsel by virtue of his professional and court experience and his independence of the

Executive is much more sensitive to problems of professional ethics. It is, however, true that the Minister of Justice is entirely independent of the Judicial Service Commission and the disciplinary section whereas the Chief State Counsel, who is not a member of the disciplinary section could be subject to its influence as he is a member of the Judicial Service Commission. It should, however, be added that a relatively simple system of prior communication ensures co-operation in commencing proceedings between the Chief State Counsel and the Minister, and the latter cannot bring proceedings otherwise than by calling on the Chief State Counsel who must act as prosecutor in the subsequent proceedings.

All this explains the meaning of two different Bills (No. 272, tabled in the Chamber of Deputies on 4 August 1983 and No. 251 tabled in the Senate on 20 October 1983) at present being examined by the Italian Parliament, the object of which is to alter the system: one provides that the right to bring proceedings in his discretion shall be vested exclusively in the Minister of Justice so that the commencement of all disciplinary proceedings is in the hands of a politically responsible authority; the other confirms the right of both the Minister and the Chief State Counsel to bring proceedings but makes provision for the disciplinary section to exercise control over the decisions of the Chief State Counsel.

In fact the present situation is somewhat ambiguous since, as the Minister of Justice does not control the Chief State Counsel's department, he depends on the Chief State Counsel, as the highest prosecuting authority, to conduct the disciplinary prosecution on his behalf.

6. In this context the fact that disciplinary offences are not defined by statute has certain disadvantages.

As a rule, the principle of a mandatory prosecution is defined in relation to the accused: it is required that the charge corresponds to a statutorily defined model of behaviour. The problem may, however, also be defined in relation to the prosecuting authority, since the conduct of proceedings requires that they shall be based on a model which is identical for the prosecutor and the court. This is of little importance in an ideologically homogeneous legal service because the prosecutor and judges probably accept the same standards and the problem then is to decide whether the standard has been observed. But the Chief State Counsel's professional experience and the Minister's political experience are not homogeneous and the disciplinary section reflects the ideological diversity in the judiciary: this means that if there are no sufficiently detailed definitions of disciplinary offences, sharp conflicts affect proceedings whose subject matter is a type of conduct which directly or indirectly affects one's conception of the functions of the judge and his place in the new society.

Moreover, apart from the difficulties in defining the types of behaviour which constitute disciplinary offences the absence of pre-existing definitions creates a problem in that there is too wide a discretion in the imposition of sanctions. The fact that detailed provision is made by statute for a number of different sanctions (in Italy: warning, reprimand entered on the file, loss of seniority, termination of office and dismissal) does not provide an answer to the question concerning the relationship between the seriousness of the disciplinary offence and the sanction to be imposed.

On this point the Italian tradition follows the Napoleonic model: disciplinary offences have always constituted an open-ended series and (with the exception of a very short period: the so-called Orlando Act (Act No. 438 of 17 July 1908)) the law has even avoided giving examples. At present paragraph 18 of Decree No. 511 of 31 May 1946 states that the judge may be subjected to disciplinary sanctions if "he acts contrary to the duties of his office or behaves in such a way in the exercise of his functions or in his private life that he injures the reputation of the judiciary or renders himself unworthy of the confidence and respect due to a judge".

Questions of constitutionality have been raised without effect in this connection. In fact the case law of the disciplinary section has illustrated the impossibility of defining disciplinary offences in advance with sufficient detail and completeness owing to the very wide variety of, sometimes unforeseeable, conduct requiring to be sanctioned. There are at present several bills being examined by parliament, the object of which is to define, on the basis of the experience of the disciplinary section, the types of behaviour for which sanctions should be imposed (No. 268 tabled in the Senate on 26 October 1983; No. 251 in the Senate and No. 272 in the Chamber of Deputies as above-mentioned); but none of them provides for a clearly defined exhaustive series of definitions of punishable conduct. It should be noted that one of these bills (No. 268 tabled in Senate) seeks to introduce a type of control of judicial activity by making it possible to impose a disciplinary sanction on a judge who inexcusably performs acts entirely contrary to the rules (section 6 No. 1 by virtue of a "serious, obvious and indisputable violation of the law due to gross negligence or deliberate misfeasance").

Furthermore the procedure, which is modelled on criminal proceedings, gives the judge accused of a disciplinary offence the same guarantees as the code of criminal procedure confers on accused persons: prompt information of the existence of an investigation, availability of the file for inspection, hearing of the accused, summons to appear before the disciplinary section and the right to be assisted by a colleague (but not by a barrister) and an appeal to the court of cassation against the section's decision. This is a system of procedural guarantees entailing the nullity of any steps taken in violation of these guarantees and providing plenty of waiting time and opportunities for adjournments.

7. The long duration of disciplinary proceedings is prejudicial to the judge's independence and peace of mind and also the sound administration of justice since the possibility of adjourning sine die the disciplinary proceedings and the decision of the case impose a sort of constraint; the punishment sometimes arrives when the offence has been forgotten. That is why several systems have put temporal limits on bringing disciplinary proceedings by establishing preclusive time limits or limitation periods. In Italy neither Decree No. 511 of 31 May 1946 nor Act No. 195 of 24 March 1958 laid down such time limits: the sensitive nature of judicial functions seemed to justify this policy which ensured that all offences would be punished. The judge was thus liable without any temporal limit to disciplinary proceedings for his faults which might be commenced by Ministers or Chief State Counsel. In this context a constitutional appeal was soon submitted to the Constitutional

Court which rejected it by its judgment No. 45 of 22 June 1976 but at the same time commented on the desirability of correcting the system. Finally, Act No. 1 of 3 January 1981 has provided time limits both for starting proceedings and for the decision at first instance. Under section 12 of the Act the Minister and the Chief State Counsel may bring disciplinary proceedings within a year after they have been informed of the facts: this is obviously a preclusive time limit based on the failure to act and the presumption of lack of interest in taking proceedings against the person concerned; the period fixed is fairly long and amply sufficient for those entitled to bring proceedings to decide on whether it is desirable to do so. At present a Bill tabled by the Minister of Justice which proposes to reduce the time limit to six months is being considered by Parliament.

Once the disciplinary proceedings have been commenced, the summons for the oral hearing of the case before the disciplinary section of the Judicial Service Commission must follow within a year; and within the next two years the disciplinary section must give its decision. Failing this, under section 12, mentioned above, the proceedings lapse unless the accused himself desires them to continue. One might think that one year would be sufficient for the investigation and issuing the summons and that two years would be sufficient for the decision of the case at first instance; furthermore the running of time is suspended if it is necessary for the decision of the case to await the result of criminal proceedings, if a question of constitutionality is raised, if an expert opinion is required or if the accused applies for and is granted an adjournment. However, the two time limits connected with the activity of the disciplinary section raise the problem of the true balance of a system characterised in principle by the fact that the right to bring proceedings is conferred on the Minister, who is politically responsible for the proper administration of the judicial services, and the Chief State Counsel and the fact that the Judicial Service Commission alone has jurisdiction to try the case. If the proceedings lapse owing to failure to act by the disciplinary section, ie the judicial authority, this has an effect on the commencement of proceedings, ie the exercise of the power conferred on the Minister and the Chief State Counsel; the disciplinary section can bring about a denial of justice in the disciplinary proceedings by merely failing to comply with the time limits for issuing the summons to attend and deciding the case. This raises the question of constitutionality as a matter of procedural law since the Minister's right to commence disciplinary proceedings is guaranteed by 107 (2) of the Constitution. On the practical level the problem is of some importance; the solution provided by Act No. 1 of 3 January 1981 must also be seen in the situation I mentioned which is characterised by the tendency of the Judicial Service Commission to extend its powers and assume control of bringing disciplinary proceedings one way or another (even by the improper use of time).

V. Conclusion

My report is very summary and indeed gives rather disproportionate attention to the composition of the disciplinary organs in the Latin countries. I apologise for this, but in fact it is not my intention to provide you with a

detailed account of the personal liability of judges in Europe, but rather to stimulate discussion by drawing attention on the one hand to the interaction of problems connected with civil and disciplinary liability and on the other the impossibility of finding solutions on the purely technical legal level.

The problem is a political one since it affects the relationship between the powers in the State: French, Italian and Spanish experience, which is apparently similar is very interesting in this connection. The policy of entrusting the management and discipline of the judges to a Judicial Service Commission constituted in such a fashion as to provide a liaison between the judiciary and the other powers in the State seems to confirm the idea that a complete separation of powers is no longer regarded as desirable; these three experiments, each against a very different background, would appear at present to be leading to different results. That is why at the end of my report I ask you the following questions:

Is it desirable that the State should accept the civil liability for the faults of judges when the tendency of the judiciary is to establish complete separation?

Is the judge's personal liability perhaps the price he must pay for his independence?

Does disciplinary control within the judiciary itself favour the establishment of the judiciary as a separate body?

What is the effect of the absence of statutorily defined punishable offences on the independence of a judge in relation to the judiciary?

ESSENTIAL ELEMENTS FOR A LEGAL REGIME GOVERNING PUBLIC LIABILITY FOR JUDICIAL ACTS

by

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INTRODUCTION

A. Exclusion of public liability for judicial acts from the general scheme of public liability

1. On 18 September 1984 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (84) 15 on Public Liability (1), requesting the member States to be guided in their law and practice by the principles annexed to the recommendation, which laid down minimum standards for the protection of individuals (2).

It appears from the Appendix to the recommendation that the public liability to which the recommendation applies does not cover acts of the public authorities relating to the administration of justice unless two conditions are satisfied: the act causing the damage is either "a normative act in the exercise of regulatory authority" or "an administrative act which is not regulatory" or a "physical act" (3) and the act must not have been done "in the exercise of a judicial function" (4). Commenting on these two conditions the explanatory memorandum of the recommendation stresses the fundamental distinction "between acts done in the exercise of a judicial function and purely administrative acts concerning the administration of

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(1) See the text and relevant explanatory memorandum of this recommendation and its Appendix in the brochure entitled "Public Liability", published in 1985 by the Legal Affairs Directorate of the Council of Europe.

(2) The essential part of the rules governing public liability set out in the Appendix to the recommendation is stated in the first two principles.

Firstly, "reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person", such failure is "presumed in the case of transgression of an established legal rule" (Principle I: see the comment on this principle in "Public Liability", the above cited brochure at pp. 13-15, paras 15-23).

Secondly, even if the conditions required by this first principle are not satisfied, "reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act". The application of this second principle may, however, "be limited to certain categories of acts only" (Principle II: ibid, pp. 15-16, paras 24-27).

(3) Appendix, Scope and definitions, para 4; see the commentary, above cited brochure, page 12, para 12.

(4) Appendix, Scope and definitions, para 5.

justice; the former do not come within the scope of the recommendation; the second whether performed by the judge himself or by his assistants ... are covered by the recommendation (1).

NB: Owing to their specific characteristics, acts performed in the exercise of a judicial function are thus excluded from the public liability dealt with in this recommendation.

B. Purpose of the report

2. The peculiar purpose of this report is to try and define the essential elements of a system of public liability applying to judicial acts.

Any research dedicated to this purpose cannot overlook the important work done in 1983 by the Council of Europe Committee of Experts on Administrative Law which has led to a draft recommendation and commentary which were submitted in 1983 to the European Committee on Legal Co-operation (2) to which we will be referring on more than one occasion (3).

Although a theory dealing with the essential elements of public liability for judicial acts should, logically, be based on a comparative study of the various solutions adopted in the domestic law of the various States we did not feel it necessary to undertake a study of this type in this report. The reason is that this has been very well done quite recently by Professor Mauro Cappelletti in the substantial general report which he presented to the XIth International Congress of the Academy of Comparative Law, which was held at Caracas (Venezuela) from 30 August to 4 September 1982. I considered that in order to avoid unnecessary repetition I could, as regards the comparative law aspect, refer the reader to the work of this eminent jurist (4).

C. Scope and definitions

1. The concept of public liability

3. It should be pointed out at the beginning that the system of liability for judicial acts which we will examine in this report relates solely to public liability, ie the obligation of the public authorities to make good damage caused by judicial acts (5); this system therefore has nothing to do with the personal liability (criminal, disciplinary or civil) which may be incurred by officials who have performed judicial acts causing damage and which may arise either from the principal action brought by the victim himself or from an action for indemnity brought by a public authority.

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(1) See commentary, above cited brochure, page 12, para 13.

(2) Council of Europe document CDCJ (83) 5.

(3) This is the document to which we will be referring when later in the report we use the expression "1983 draft recommendation".

(4) The revised version of Professor Capelletti's report has been published under the title "Who watches the watchmen? - a comparative study on judicial responsibility" in the American Journal of Comparative Law, Volume XXXI, 1983, No. 1, pp. 1-62; see references to the various national reports, ibid, note 1, pp. 1-2.

(5) Cf Appendix to Recommendation R (34) 15 of 18 September 1984, scope and definitions, para 1, and the Appendix to the 1983 draft recommendation, scope and definitions, para 2.

2. Concept of a judicial act

4. It is obviously essential to define as precisely as possible the meaning of the concept, «judicial act», since the system of public liability may differ fundamentally depending on whether the act causing damage is or not a judicial act. It is a concept which is not easy to determine and can have many different meanings in different States and even within any particular State.

The Appendix to the 1983 draft recommendation defined it as «any action or omission of a judicial nature occurring in the administration of justice» (1), the expression «administration of justice» meaning «the exercise of the judicial function by the public bodies which are institutionally entrusted therewith» (2). This seems to me to be merely tautological and essentially to base the definition of a judicial act on the criterion of the «judicial nature» of the act or function without defining the meaning of the word «judicial» itself. Moreover, as pointed out by the draft explanatory memorandum, in the system of the 1983 draft recommendation it was left to the domestic law of each State to determine the exact content of this expression (3), this system therefore did not comprise an autonomous concept of the «judicial act», but referred to domestic law of each State. A set of principles governing public liability in which the concept of «judicial acts» was an autonomous concept (4) (in the sense that this concept could not be interpreted according to any particular system of domestic law) would, I feel, not have the sole advantage of being more precise but would also appear more in accordance with the purpose of the Council of Europe which implies a harmonisation of legal systems, and indeed this should persuade the member States to make an effort to reach agreement on a common denominator for this concept.

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(1) Appendix, scope and definitions, para 3.

(2) Appendix, scope and definitions, para 4.

(3) Draft explanatory memorandum, page 8; para 7.

«That law will accordingly have to indicate which areas must be considered judicial and, therefore, falling under the recommendation (eg civil, criminal, administrative, fiscal matters etc).

The judicial function is generally regarded as being that of applying the law, either in disputes between parties or when the law has been infringed.

It follows that in the case of acts carried out by the police under the authority of the courts it is up to national law to determine whether those acts must be considered judicial acts covered, as such, by this recommendation or non-judicial acts covered by Recommendation No. R (84) 15 on Public Liability.»

(4) This autonomy would not prevent one from having regard to the legal systems of the member States for the interpretation of the concept of «judicial act» to the extent that the general principles recognised by these legal systems may serve as a guide to discover the meaning and scope of this concept (cf the judgements of the European Court of Human Rights relating to the autonomy of the concepts used in the European Convention on Human Rights).

That is why in the rest of this paper I have felt entitled to use the expression «judicial acts» as an autonomous concept.

From two points of view this must be understood in a wide sense.

Firstly the expression «act» will include any conduct (action or omission) producing direct effects on a person's rights, freedoms or interests.

Secondly, the expression «judicial act» itself means, to borrow the terminology of Recommendation No. R (84) 15, any act carried out in the administration of justice which is performed in the exercise of a judicial function (1).

For our purpose a judicial function refers not only to giving a judgement in contentious proceedings but also any function exercised either by members of the legal service or on their behalf or under their responsibility, supervision or direction with the object of contributing to the establishment or execution of such judgements.

The suggested definition thus proposes a distinction between two categories of judicial acts.

5. The first category includes all acts performed in the exercise of powers the object of which is to give judgements in contentious proceedings (2).

By judgement in contentious proceedings we mean any decision of an organ of the public authorities which, having an obligation to be independent and impartial, after a trial, which must be fair, makes a decision on a dispute according to the rules of law: furthermore this decision must be capable of binding the parties.

This definition, which is based on the wording of Articles 6 (1) of the European Convention on Human Rights and 14 (1) of the International Covenant on Civil and Political Rights, is complex in the sense that it cannot be reduced to a single criterion (3). It implies that in order to determine

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(1) Appendix, scope and definitions, para 5.

(2) Judgements in contentious proceedings are sometimes referred to as «judicial acts» in the narrow sense.

(3) On the argument that the concept of a court within the meaning of the provisions of the European Convention on Human Rights can also not be reduced to a single criterion, see my study «La notion de 'tribunal' and the associated concepts in the Convention for the Protection of Human Rights and Fundamental Freedoms» in Liber Amicorum Frederic Dumon, Antwerp 1983, Volume II, page 1287 et seq, esp. pp 1300-1306.

whether an act is or not a judgement in contentious proceedings and thus a judicial act one cannot rely on a single criterion whether this criterion be factual, «organic», or formal (procedural) in its nature or the criterion that the judgement is binding on the parties: it is necessary to consider whether in law the act the character of which is perhaps called into question complies to a sufficient extent with the requirements of these various criteria:

- Factual criteria (relating to the subject-matter to which the act applies): the act implies a dispute. Its content must be a decision stating whether the act or omission from which the dispute arises is or is not in accordance with law, thus providing, or tending to provide, a solution to the dispute as a consequence of this declaration. A dispute to which the decision relates may fall under the jurisdiction of the civil, criminal, constitutional, administrative, commercial, social, tax, military or disciplinary courts.

In criminal matters only judgements relating to the determination of a criminal charge or the lawfulness of a deprivation of freedom will be considered as coming within the category of judgements in contentious proceedings (1).

- «Organic» criteria (ie relating to the organ by which the act is performed): the person or body performing the act (generally a court) has a functional obligation of independence (2) and impartiality (3). Independence must be guaranteed both with respect to the parties and with respect to other public authorities: apart from appeals to a higher court the organ performing the act must not be subject either to control by official superiors or to the supervision of another authority. The obligation of impartiality implies (inter alia) that a judge should withdraw if it may reasonably be feared that he is prejudiced or has an interest in the case.

- formal or procedural criteria (relating to the form of the act or to the procedure): at the least, the procedure must comply with the requirements of a fair trial (4). This means that, generally speaking, every party must have a reasonable opportunity of putting its case under conditions which do not place it at an appreciable disadvantage as compared with the other side, and, in criminal cases, that «equality of arms» must be guaranteed between the prosecution and the defence.

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(1) Cf European Convention on Human Rights, Articles 5 (4) and 6 (1) and the International Covenant on Civil and Political Rights, Articles 9 (4) and 14 (1).

(2), (3) and (4) On the concepts of fair trial by an independent and impartial court, see the numerous decided cases of the European Court and Commission of Human Rights on Article 6 (1) of the European Convention on Human Rights (see, in particular: Council of Europe, Digest of Strasbourg Case Law relating to the European Convention on Human Rights, Cologne - Berlin - Bonn - Munich 1984, Volume 2 (Article 6), pages 266-702).

- Criterion relating to the binding nature of the judgement as between the parties:

The act must be capable of being regarded as binding on the parties, ie as having legal force and constituting an obstacle to any repetition of the proceedings.

Although the nature, conditions and effects of the rules relating to the binding effect of the judgement may differ in the legal systems of different States and even within each system depending on the subject matter (1), it is generally accepted that this binding force is final and can no longer be attacked when the judgement is given at last instance, the time-limits for ordinary appeals have expired or the party against whom the judgement is given has accepted it.

6. The second category of judicial acts referred to in the proposed definition includes all acts done in the exercise of the various powers the object of which is to contribute to the establishment or execution of judgements in contentious proceedings, provided, however, that they can be imputed either to members of the legal service or to other organs of public authority acting under the authority, responsibility, supervision or direction of members of the legal service.

This relates principally to acts or omissions which may occur:

- in performing duties forming part of the functions of the police, ie the functions concerned with the investigation of offences, collection of evidence and placing the offenders at the disposition of the courts (eg the improper prolongation of police custody, illegal searches etc).

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(1) The concept of a «decision binding on the parties» should not be confused with that of a «final decision».

In the legal terminology of the Council of Europe one generally understands by a final decision a decision which is final in the sense of being irrevocable, either because it is not subject to ordinary appeals or because the parties have exhausted the appeals or allowed the time for appealing to expire without taking action (Explanatory report on the European Convention on the International Validity of Criminal Judgements, Council of Europe document 1970, commentary on Article 1 (a), page 22; explanatory report on Protocol No. 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe document H (84) to 5 rev, commentary on Article 3, page 11, No. 22).

- in the conduct of the investigation or preparation of the case (illegal conduct by the investigating judge or investigating court, arbitrary seizures, loss of documents),

- during the trial proceedings themselves,

- in the execution of judgements in contentious proceedings where the acts of execution complained of fall within the jurisdiction of the judicial authorities etc.

7. The following are, therefore, not to be considered as judicial acts even although they relate to the administration of justice: acts of judicial administration and in particular judgements in non-contentious proceedings, ie decisions which judges make in matters where there is no dispute when they are exercising powers of recording, regularising, protection, guardianship, authorisation or control; for example judgements whose purpose is to rectify, record or approve certain transactions (1).

- acts by the judicial authorities relating to the organisation of court departments,

- administrative acts by the administrative authorities relating to the administration of justice, with the exception of those taken under the authority, responsibility, supervision or direction of members of the legal service with a view to the establishment or execution of judgements in contentious proceedings.

D. Plan

8. I have decided to divide this report into two parts.

The first part deals with the examination of certain rules of international law. A theory on the essential elements governing this subject cannot possibly be constructed without taking account of the rules already established by international law concerning State responsibility for judicial acts. Certainly, too, such a theory cannot be interpreted as affecting, or being capable of affecting, these rules.

In the second part I shall try to work out a number of principles which might constitute an absolute minimum of protection for litigants by which States should be guided in their law and practice. This means that these principles cannot be relied on to limit either the right to damages which, in certain circumstances, is granted by existing positive law to persons who have suffered damage as a result of judicial acts (2), or the right of States to apply these principles to other categories of judicial acts than those here contemplated or to adopt provisions granting more extensive protection to the victims (3).

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(1) A procedure which originally involves no dispute may, however, become contentious if differences arise in the course of the proceedings, in particular after third parties have been joined either voluntarily or on third party notice. In this case the decision which terminates the proceedings would be a judgement in contentious proceedings.

(2) Cf Convention on the Protection of Human Rights and Fundamental Freedoms, Article 60; International Covenant on Civil and Political Rights, Article 5 (2).

(3) Cf Appendix to Recommendation R (84) 15, Final provisions, sub-paragraph (a).

PART I

RULES OF INTERNATIONAL LAW

A. Liability for judicial acts in traditional international law

9. I will only refer briefly to the traditional rules of international law relating to liability for judicial acts as these rules only govern the relationship between States.

Under this law, State liability takes the form of legal rules by virtue of which the State to whom an act unlawful in international law is imputable must make reparation to the State against whom this act has been committed (1). The damage for which reparation is due is the harm caused either to a national of the State or to the State itself or to both. The components of this international liability are autonomous in their relationship to the components of public liability in domestic law. It arises from any internationally unlawful act of the State in question (2), which implies, first, conduct consisting of an act or omission attributable to the State under international law (imputability) and, secondly, that this conduct amounts to a violation of an international obligation of the State (unlawfulness) (3).

A State may be responsible for judicial acts under the same conditions as those which apply to its responsibility for other acts of State (4).

As regards the condition of imputability, it is now generally admitted that the conduct of a State organ is considered as an act of the State itself in international law whether the organ in question is exercising a judicial function or a function of some other nature, constituent, legislative, executive etc (5).

As regards the condition of unlawfulness, the conduct of an organ of State exercising a judicial function can constitute a violation of an international obligation of the State. A violation by such an organ of an international obligation of the State exists when its conduct (ie act or omission) is not in accordance with what is required by this obligation (6). In the light of international practice it appears that two categories of acts may involve the international liability of the State in connection with the judiciary: either a denial of justice in the broad sense (refusal of access to the courts or various defects in the organisation or exercise of the

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(1) C ROUSSEAU, Droit international public, Volume V, Paris 1983, p. 6, No. 2 and the bibliographical references on pp. 5-6.

(2) Draft on State liability adopted on first reading by the International Law Commission, Article 1.

(3) Above cited draft on State liability, Article 3.

(4) On the international liability of the State for judicial acts. See C Rousseau, op. cit., pp. 66-72, paras. 59-67 and the bibliography.

(5) Above cited draft on State liability, Article 6.

(6) Above cited draft on State liability, Article 15.

judicial function: ill-will, discrimination, excessive delay etc) or the violation by the judicial organ of international rules which should be applied by the State. An incorrect judgment or miscarriage of justice is not a ground for State liability unless it violates an international obligation of the State. As held by the Permanent Court of International Justice in the Lotus case, "the fact that the judicial authorities were alleged to have committed an error in the choice of the legal provision applicable to the case and compatible with international law is exclusively a matter for the domestic law and could only concern international law to the extent that a rule established by a treaty or the possibility of a denial of justice might be involved" (1).

B. Liability for judicial acts in the law of international instruments relating to human rights

10. The rules contained in the international instruments relating to human rights have a more direct connection with public liability for judicial acts in the sense that liability is here understood although they do not make provision for a general right to obtain, in the domestic legal system, reparation for unlawful damage caused by a judicial act even though the latter was performed in violation of the rights and freedoms recognised by those instruments.

A distinction should be drawn between those of these rules which relate to the content or extent of the rights and freedoms and those which concern the control of their observance.

1. Rules on the content and extent of rights and freedoms, which deal with the liability for judicial acts

11. Two aspects of liability for judicial acts are dealt with by some of the rules both in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the International Covenant on Civil and Political Rights (2). These are the right to compensation in certain cases of deprivation of freedom and the right to compensation in some cases of miscarriage of justice.

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(1) CPJI, Série A, No. 10, p. 24.

(2) In the rest of this report these two international instruments will be referred to respectively as the "European Convention" and the "International Covenant".

a. The right to obtain compensation in some cases of deprivation of freedom

12. Under Article 5 (5) of the European Convention "everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation" (1) and under Article 9 (5) of the International Covenant "anyone who has been the victim of unlawful arrest or detention shall have the enforceable right to compensation".

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(1) Paragraphs (1) to (4) of this article of the Convention read:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

On the case-law of the European control organs relating to Article 5 (5) of the Convention, see in particular: Council of Europe, Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights, Cologne - Berlin - Bonn - Munich, 1884, Volume I, pp. 653-663.

Although relatively similar, these two provisions vary a little in scope from two points of view.

13. The first difference which is revealed by the wording of these two provisions relates to the content of the right to compensation.

The nature of the unlawfulness sanctioned by this right to compensation is not defined in the same way in both instruments.

Article 5 (5) of the European Convention confers the right to compensation not only when, contrary to paragraph 1, the deprivation of freedom occurs in conditions incompatible with the procedural or substantive rules applicable in the domestic law but also when it does not fall within one of the six cases exhaustively listed in paragraph 1 or when the person deprived of his freedom has not been given the benefit of one of the rights recognised in paragraphs (2), (3) and (4).

On the other hand, Article 9 (5) of the International Covenant only recognises the right to compensation when the deprivation of freedom has been unlawful, ie when it has occurred in conditions incompatible with the procedural or substantive rules applicable in the domestic law.

It would seem to be only in States where the provisions of Article 5 of the European Convention and/or Article 9 of the International Covenant have been incorporated into the domestic legal system and are directly applicable therein that the concept of the unlawfulness of the arrest or detention within the meaning of Article 9 of the International Covenant could be interpreted as covering failure to comply not only with the domestic legislation in the strict sense but also with the above cited provisions of the European Convention and/or the International Covenant.

14. The second difference, which appears from the preparatory documents relating to the two provisions, relates to the persons bound by the obligation corresponding to the right to compensation.

The right to compensation conferred by Article 5 (5) of the European Convention only imposes a single obligation on the States, Parties to the Convention: that of giving the victim the legal possibility of bringing an action for damages against the person or persons liable under the system of the European Convention; it would not appear possible to interpret this right to compensation as imposing on the States, Parties to the treaty, themselves, the obligation to guarantee the payment of the damages due from the persons liable (1).

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(1) This interpretation follows from the unambiguous positions adopted by those preparing the European Convention. At the first meeting in February 1950 of the committee of experts responsible in the Council of Europe for preparing a draft convention on human rights the United Kingdom delegation made a proposal to insert in the draft an article on the right to security of the person, the wording of which was largely based on the text submitted to the United Nations Commission on Human Rights by the representatives of Australia, Denmark, France, the Lebanon and the United Kingdom. At this first meeting of the committee of experts this proposal was not accepted.

(footnote continued on page 88)

The position is not the same in the system of the International Covenant. The discussions in the United Nations Commission on Human Rights show that the Commission intended that the right of a person who had been unlawfully arrested or deprived of his freedom should be effective. The commentary of the United Nations Secretariat stresses that with this in view "the right to compensation, stated in general terms, seems to be enforceable both against individuals and against the state, regarded as a legal entity" (1). Article 9 (5) of the International Covenant can thus, it appears, be interpreted to mean that the victim's claim for compensation may be brought against the State as well as against the person or persons directly liable.

(Footnote (1) continued from page 87)

The United Kingdom expert again put forward his proposal, slightly amended, at the second meeting of the committee in March 1950. This text provided that "everyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation". Again the committee decided not to accept the proposal. Thus the committee's report states, "A majority of the members of the committee considered that this phrase might be held to impose on States, Parties to the Convention, an obligation to ensure the payment of damages, for example, by persons ordered to pay them as a result of a civil action. This appeared to be an undesirable requirement and the paragraph was therefore omitted". In the opinion of the United Kingdom representative, "The paragraph did not bear this meaning, and he considered that the inclusion of such a provision in the Convention was desirable" (doc. CM/WP I (50) 15, p. 22; Collected Edition of the Travaux Préparatoires II, p. 492).

The United Kingdom proposal was again introduced in June 1950 at the Conference of Senior Officials by which it was adopted. The conference report contains the following comment on this subject: "This paragraph gives anyone who has been a victim of unlawful arrest or illegal detention - that is to say, in violation of the relevant legal provisions - the right to compensation to repair the harm which he has suffered as the result of arrest and illegal detention. The action should be taken against the person or persons responsible". (doc. CM/WP 4 (50) 19, pp. 14 and 15; DH (56) 10, p. 20; a Collected Edition of the Travaux Préparatoires, Volume III, p. 652).

(1) United Nations document A/2929, paragraph 36 "It was pointed out", the document continues, "that the legislation of certain States made provision for the civil liability of individuals in case of malicious intention or gross negligence and the following phrase was suggested in order to bring paragraph 5 into line with such legal systems: '... has the right to bring an action for compensation against anyone who with malicious intent or through gross negligence may have been the direct cause of this unlawful arrest or detention'. However, the Commission did not adopt this provision".

15. It follows that, though from the point of view of its contents, the right to compensation contained in the European Convention in relation to the deprivation of freedom appears more extensive than that recognised by the International Covenant, domestic law public liability for judicial acts in this field is only internationally guaranteed by the International Covenant and only to the extent provided for in that instrument.

On the basis of this finding it is proposed in the second part of this report to include among the principles for the minimum protection by which States might be guided in their law and practice the following rule, namely, that there shall be public liability in the case of damage suffered by reason of arrest or detention in circumstances contrary to paragraphs (1) to (4) of Article 5 of the European Convention (1).

b. The right to receive compensation in certain cases of miscarriage of justice

16. This right is conferred by Articles 14 (6) of the International Covenant and 3 of Protocol No. 7 to the European Convention.

At the moment only the first of these two international instruments has come into force. Under Article 14 (6) of the International Covenant, "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

The wording of Article 3 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984 but not yet in force (2), is almost identical (3).

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(1) See below, paragraph 32.

(2) By virtue of Article 9, Protocol No. 7 will come into force on the first day of the month following the expiration of a period of two months after the date on which seven members of the Council of Europe have expressed their consent to be bound by that instrument.

(3) The text of this article reads as follows:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

There are two slight differences as compared with Article 14 (6) of the International Covenant:

- ... (In the French text only) "la personne qui a subi une peine en raison de cette condamnation", instead of "à raison de cette condamnation",
- ... "according to the law or practice of the State concerned", instead of "according to law" (with no reference to the practice of the State concerned).

17. The right to compensation for a miscarriage of justice thus depends on four conditions.

i. That the person has been finally convicted of a criminal offence. In this context a conviction should be considered as final when it is no longer subject to ordinary appeals, the parties have exhausted these appeals or allowed the relevant time-limits to expire without appealing (1).

ii. The person in question has been punished as a result of this conviction.

iii. The conviction is subsequently set aside or a pardon granted (2) because, in either case, the new or newly discovered fact proves that a miscarriage of justice has occurred, in other words "some serious failure in the judicial process involving grave prejudice to the convicted person (3). There is no right to compensation if the conviction has been set aside or the pardon granted for some other reason.

iv. It is not proved that the non-disclosure in time of the unknown fact is wholly or partly attributable to the convicted person.

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(1) See above p. 10, note 1 and the explanatory report on the European Convention on the International Validity of Criminal Judgments, Council of Europe publication, p. 22 and the explanatory report on Protocol No. 7; Council of Europe document H (84) 5 rev., p. 11, para. 22. From the comments in this report it appears, firstly, that there is no right to compensation when the conviction occurred in absentia so long as the domestic law allows the proceedings to be resumed, when the prosecution has been discontinued or when the accused has been acquitted either by the court of first instance or on appeal by a higher court. On the other hand there may be right to compensation, if in one of the States where provision is made for this possibility, a person has been given leave to appeal out of time and the conviction is set aside on appeal (H (84) 5 rev., p. 11, para. 22).

(2) The explanatory report to Protocol No. 7 explains that the words "or he has been pardoned" were included because, in some systems of law, pardon rather than legal proceedings leading to the reversal of a conviction may in certain cases be the appropriate remedy after there has been a final decision" (H (84) 5 rev., p. 12, para. 23).

(3) Ibid, p. 12, para. 23.
According to the explanatory report to Protocol No. 7 there is no obligation to pay compensation except in clear cases of a miscarriage of justice, in other words when it is recognised that "the person concerned was clearly innocent". The report continues: "The article is not intended to give a right to compensation where all the preconditions are not satisfied; for example where an appellate court has quashed a conviction because it has discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge" (ibid, p. 12, para. 25).

18. From the fact that, under these provisions, compensation is payable according to law (or the practice in the State concerned) it cannot be concluded that no compensation is payable if the existing law or practice makes no provision for such compensation. On the contrary these provisions imply that the domestic law should provide for the payment of compensation in all cases in which they are applicable (1).

We will return to these provisions in the second part of the report when considering whether there should be included in the principles for minimum protection, the adoption of which could possibly be recommended to States, a rule relating to the right to compensation in certain cases of miscarriage of justice (2).

2. Rules relating to the control of the observance of rights and freedoms which might affect liability for judicial acts

19. We will consider later in the second part of the report the effects which these rules of international law may have on the principles of minimum protection by which States might be guided in their law and practice in this field (3).

Some of these rules concern national control and others international control. Among the rules relating to international control we will only mention those which organise this control at the European level.

a. National control

20. By virtue of Articles 13 of the European Convention and 2 of the International Covenant, everyone whose rights and freedoms recognised in these instruments have been violated by an act of the authorities, whether judicial or otherwise, shall have an effective remedy ("effectif" in the French text of the European Convention and "utile" in the French text of the International Covenant) before a national authority, even if the violation has been committed by persons acting in an official capacity.

However, these provisions do not necessarily imply that a person whose rights and freedoms recognised in the above-cited instruments have been violated by a judicial act is entitled to receive compensation for this damage. Article 13 of the European Convention and 2 of the International Covenant do not refer to the purpose of the remedy thus leaving the Contracting States a wide discretion in this respect. Their only obligation is to ensure that the remedy should be effective ("effectif" or "utile" in the French texts). Subject to this reservation they can organise the remedy as they think fit: depending on the case, the result of the remedy may be the physical termination of the act constituting the violation, its cancellation, its withdrawal, its alteration or non-application, civil damages, criminal or disciplinary sanctions etc.

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(1) Explanatory report to Protocol No. 7, H (84) 5 rev., p. 12, para. 25.

(2) See below, paras. 49 to 53.

(3) See below, paras. 33 to 36.

b. Control at European level

21. Proceedings to establish the liability of a State, Party to the European Convention, can under various provisions of the latter, in particular Articles 32 and 50, be brought before the European Court of Human Rights or the Committee of Ministers of the Council of Europe, in particular when a judicial act has infringed the obligation imposed by the Convention.

i. Power of the European Court of Human Rights to afford just satisfaction to a party injured by a judicial act which infringes the Convention

22. Under Article 50 of the European Convention, "if the Court finds that a decision or measure taken by a legal authority (autorité judiciaire) ... of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

The Court has a wide discretion in this matter: it does not grant just satisfaction unless it is "necessary" having regard to what is fair in all the circumstances of the case (1). In particular in a case of a judicial act contrary to the rights and freedoms guaranteed by the European Convention, the grant of just satisfaction requires, apart from certain procedural conditions (2), that at least four substantive conditions are satisfied.

23. In the first place the Court must have found "that a decision taken by a legal authority (autorité judiciaire) ... of a High Contracting Party is completely or partially in conflict with the obligation arising from the present Convention".

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(1) Tyrer judgment of 25 April 1978, series A, No. 26, p. 20, para. 45; Sunday Times judgment of 6 November 1980, series A, No. 38, p. 9, para. 15 in fine; Guzzardi judgment of 6 November 1980, Series A, No. 39, p. 42, para. 114; Dudgeon judgment of 24 February 1983, Series A, No. 59, p. 7, para. 11 and Silver and others, 24 October 1983, Series A, No. 67, p. 6, para. 9.

(2) The procedure to be followed in applying Article 50 of the European Convention was not prescribed in the Court's Rules of Procedure until 1972. It is at present governed by Rules 49, 53 and 54 of the Rules of Procedure of 24 November 1982, which have been in force since 1 January 1983.

The expression "decision or measure taken" covers omissions as well as acts; the Court may therefore grant just satisfaction for a failure to act by the judicial authorities of the respondent State which the Court has declared to be incompatible with the obligations imposed by the Convention (1) (2).

24. Secondly just satisfaction cannot be afforded to the injured party unless "the internal law" of the Contracting State to whom the judicial act amounting to a fault is imputable, "allows only partial reparation to be made of the consequences of this decision or measure".

This condition must not be interpreted too strictly: according to the Court the condition is satisfied not only in a case where the nature of the injury itself would make it possible to make complete reparation for the consequences of the violation but the internal law of the respondent State makes this impossible, but also in the case where the impossibility of a "restitutio in integrum" is due to the particular nature of the injury. It follows that when, owing to the nature of the injury, no legal system could completely make good the consequences of the violation, it cannot be argued that the application for just satisfaction is ill-founded on the sole ground that the injured party could or should have first brought proceedings for compensation against the respondent State (3).

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(1) De Wilde, Ooms and Versyp, 10 March 1972, Series A, No. 14, pp 10-11, paragraphs 22-23.

(2) Article 50 of the Convention applies, in particular, in the case where the fault involved consists in a violation of Article 5 of the Convention (right to liberty and security of the person). It has been argued that Article 5 (5) created an exception to the "lex generalis" of Article 50 and so excluded its application. The Court rejected this argument but stated that when exercising the power conferred on it by Article 50 it takes into consideration (inter alia) the substantive rule in Article 5 (5) (Ringeisen, 22 June 1972, Series A, No. 15, pp 7-8, paragraphs 14-19 and Neumeister, 7 May 1974, Series A, No. 17, pp 13-14, paragraph 30.

(3) De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, No. 14, p , paragraph 20, No. ; Ringeisen of 22 June 1972, Series A, No. 15, p 8, paragraph 21; Neumeister of 7 May 1974, Series A, No. 17, p 18 in fine; König of 10 March 1980, Series A, No. 36, pp 14-15, paragraph 15; Sunday Times of 6 November 1980, Series A, No. 38, pp 8-9, paragraph 13; Guzzardi, 6 November 1980, Series A, No. 39, pp 41-42, paragraph 113; Eckle of 21 June 1983, Series A, No. 65, p 7, paragraph 13; Piersack, 26 October 1984, provisional edition, p 5, paragraph 11.

25. Thirdly, the injured party (1) must prove the existence of a damage and indicate its nature (2). When assessing the alleged damage, the Court, which applies autonomous criteria and not the legal rules of the respondent State (3), makes a distinction between damage in the strict sense resulting from the violation of the Convention and the costs necessarily incurred by the victim (4).

Damage in the strict sense may be material and/or non-material. Material damage may consist in the loss of a real opportunity (5). Frequently, as for example in Marckx (6), Deweer (7) and Le Compte I (8), the Court considered that the simple finding of a violation is adequate reparation for the non-material damage (9) (10).

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(1) The expression "injured party" used in Article 50 of the Convention is synonymous with the term "victim" in Article 25 of the Convention: it is the person directly affected by the failure to comply with the provisions of the Convention which the Court has found to exist (De Wilde, Ooms and Versyp judgment of 10 March 1972, Series A, No. 14, pp 10-11, paras 22-23; Sunday Times, 6 November 1980, Series A, No. 38, p 8, para 13 and Airey, 6 February 1981, Series A, No. 41, pp 7-8, para 9).

(2) Guzzardi judgment of 6 November 1980, Series A, No. 39, p 42, para 114 and Corigliano, 10 December 1982, Series A, No. 57, p 17, para 53.

(3) Sunday Times judgment of 6 November 1980, Series A, No. 38, p 9, para 15.

(4) Neumeister judgment of 7 May 1974, Series A, No. 17, pp 20-21, para 43; Sunday Times, 6 November 1980, Series A, No. 38, p 9, para 16; Le Compte, Van Leuven and De Meyere, 18 October 1982, Series A, No. 54, p 7, para 14 and Minelli, 25 March 1983, Series A, No. 62, p 20, para 43.

(5) Goddi judgment of 9 April 1984, provisional edition, p 11, paras 35-36.

(6) Marckx, 13 June 1979, Series A, No. 31, p 29, para 68.

(7) Deweer, 27 February 1980, Series A, No. 35, pp 31-32, paras 59-60.

(8) Le Compte, Van Leuven and De Meyere, 18 October 1982, Series A, No. 54, p 8, para 16.

(9) Golder, 21 February 1975, Series A, No. 18, pp 22-23, para 46; Engel and others, 23 November 1976, Series A, No. 22, p 69, para 11; Corigliano, 10 December 1982, Series A, No. 57, p 17, para 53; Dudgeon, 24 February 1983, Series A, No. 59, pp 7-8 and 9, paras 14 and 18; Campbell and Cosans, 22 March 1983, Series A, No. 60, p 10, paras 17-20; Minelli, 25 March 1983, Series A, No. 62, p 20, paras 43-44; Pakelli, 25 April 1983, Series A, No. 64, p 20, para 46; Eckle, 21 June 1983, Series A, No. 64, pp 10-11, paras 21-24; Zimmermann and Steiner, 13 July 1983, Series A, No. 66, p 14, para 35; Silver and others, 24 October 1983, Series A, No. 67, p 6, para 10; Luberti, 23 February 1984, Series A, No. 75, pp 18-19, para 41 and Campbell and Fell, 28 June 1984, provisional edition, p 50, paras 140-141.

(10) However, in the case of non-material damage arising from a violation of Article 5, the Court tends, having regard in particular to paragraph 5 of that article, as in the Van Droogenbroeck judgment (25 April 1980, Series A, No. 63, p 7, para 13), to concede that a finding of a violation is not in itself sufficient reparation for this damage and to grant pecuniary satisfaction (Neumeister, 7 May 1974, Series A, No. 17, p 13, penultimate paragraph in fine; X v. United Kingdom, 18 October 1982, Series A, No. 55, p 16, paras 17-19; Duinhof and Duyf, Zuiderveld and Klappe, 22 May 1984, provisional edition, p 17, paras 51-52 and De Jong, Baljet and Van den Brink, 22 May 1984, provisional edition, pp 24-25, paras 64-65).

As regards costs (1), the injured party must prove not only their existence but also that they were necessary and the amount reasonable (2). It must therefore have incurred these costs (3) in attempting to prevent or remedy a violation in the domestic legal system, or to persuade the Commission or subsequently the Court to find that the violation exists, or to obtain reparation (4). The costs of which the Court takes account include counsel's fees and costs (5) to the extent it is proved that they exist and were necessary and reasonable in amount. This means, as we have just stated, that they were incurred either in proceedings before the domestic authorities with a view to preventing or remedying the violation of the Convention or in

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(1) The grant of just satisfaction for costs may take the form of a declaration by the Court stating that the defendant State must refrain from recovering costs (Piersack, 26 October 1984, provisional edition, p 8, first head of the order).

(2) Sunday Times, 6 November 1980, Series A, No. 38, pp 13-18, paras 23-42; Dudgeon, 24 February 1983, Series A, No. 59, p 9, para 20; Minelli, 25 March 1983, Series A, No. 62, p 20, para 45; Eckle, 21 June 1983, Series A, No. 65, p 11, para 25; Zimmermann and Steiner of 13 July 1983, Series A, No. 66, p 14, para 36; Campbell and Fill, 28 June 1984, provisional edition, p 51, paras 143-146; Özturk, 23 October 1984, provisional edition, p 3, para 9, and McGoff, 26 October 1984, provisional edition, p 8, para 31.

(3) It is of little relevance that the costs were paid by a third party, provided that the applicant accepted legal responsibility for their payment (Dudgeon, 24 February 1983 (Article 50), Series A, No. 59, p 9, paras 20-21).
Costs paid not by the injured party but by his insurance company are not taken into consideration, see Özturk, 23 October 1984, provisional edition, p 3, para 8.

(4) Neumeister, 7 May 1974, Series A, No. 17, pp 20-21, para 43; Dudgeon, 24 February 1983, Series A, No. 59, p 9, para 20; Minelli, 25 March 1983, Series A, No. 62, pp 20 and 22, paras 45 and 50; Eckle, 21 June 1983, Series A, No. 65, p 11, para 25 and Zimmermann and Steiner, 13 July 1983, Series A, No. 66, p 14, para 36.

(5) It is of little relevance that counsel, aware of his client's poor financial position, did not put in his bill of costs until he filed the application for just satisfaction or that his claim for fees is statute-barred, provided that the applicant himself is not relying on limitation (X v. United Kingdom, 18 October 1982, Series A, No. 55, p 18, para 24 and Pakelli, 25 April 1983, Series A, No. 64, p 20, para 47).
But the Court refuses to take account of the costs and fees of counsel when the application comes not from the applicant but from a barrister whom the applicant refuses to recognise as his representative. The same applies when the applicant has been given free legal aid for the proceedings in the Commission and the Court and does not prove that he has paid or must pay his counsel additional fees and costs (Van Droogenbroeck, 25 April 1983, Series A, No. 63, p 8, para 15).
When the applicant has been given free legal aid and does not claim to have paid or be under an obligation to pay his counsel an additional fee for which he may demand reimbursement, as this counsel is not an injured party within the meaning of Article 50, he cannot apply for just satisfaction on his own behalf (Luedicke, Belkacem and Koç, 10 March 1980, Series A, No. 36, p 8, para 15).

proceedings in the Commission or in the Court in order to persuade the Commission or the Court to find that a violation existed, or to obtain reparation (1).

26. Finally there must be a causal connection between the fault and the damage.

This condition is probably the most difficult one for the party claiming that he has been injured to establish, particularly as regards material damage. Thus, if the only fault established is a violation of Article 5 (4) (right of a person deprived of freedom to take proceedings before a judicial tribunal for a decision on the lawfulness of his detention), an applicant applying for reparation of the material damage consisting in his continued detention must prove that he would have been released earlier if he had benefited from the guarantees contained in this provision (2); similarly, if the only fault proved is the violation of the rules relating to public hearings in Article 6 (1), the applicant applying for reparation of the material damage constituted by the sentence imposed by the Court, must prove that this sentence would not have been imposed if the rules relating to public hearings had been observed (3).

ii. Powers of the Committee of Ministers of the Council of Europe

27. Under Article 32 of the European Convention, when within three months of the transmission to the Committee of Ministers of the Commission's report the case is not brought before the Court, the power to make binding decisions in the case lies with this committee. If the Committee of Ministers decides that an act, judicial or otherwise, of the respondent State infringes the Convention, it fixes a period during which the State must take the measures required by the decision. If this State has not taken satisfactory measures within the prescribed period, the Committee of Ministers decides what effect shall be "given to its original decision and shall publish the report" (Article 32, (3), of the Convention).

The Convention thus confers a wide discretion on the Committee of Ministers; in my opinion, therefore, it would, in an appropriate case, be entitled to decide that the respondent State should grant the injured party just satisfaction.

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(1) See in particular Eckle, 21 June 1983, Series A, No. 65, pp 11-20, paras 26-51.

(2) De Wilde, Ooms and Versyp, 10 March 1972, Series A, No. 14, p 11, para 24 and Van Droogenbroeck, 25 April 1983, Series A, No. 63, p 6, paras 11-12.

(3) Albert and Le Compte, 24 October 1983, Series A, No. 68, p 7, para 11.

PART II

MINIMUM PRINCIPLES BY WHICH THE STATES MIGHT BE GUIDED

28. The time has passed when non-liability for judicial acts could be justified by sovereignty: in our age the prerogatives of the public authorities no longer include that of non-liability. By excluding from its scope acts relating to the administration of justice performed in the exercise of judicial functions (1), Recommendation No. R (84) 15 merely confirms the idea, now generally accepted, that a State based on the rule of law must provide minimum protection for individuals under its jurisdiction by accepting public liability for judicial acts. This liability, however, must be governed by special rules adapted to the specific nature of such acts.

This specific character applies particularly to judicial acts in the performance of functions whose object is the giving of judgments in contentious proceedings. This applies to each of the requirements, mentioned above (2), which make up the concept of a judgment in contentious proceedings.

- Factual requirements: the purpose of a judgment in contentious proceedings is to provide a legal solution to a dispute: the object of each of the parties to the dispute is to persuade the judge to share his point of view; as P Ardant states, "not only will the party not assist in discovering the truth, but will be tempted to confuse the facts and amputate the relevant authorities with the sole, though often unconscious, purpose of misleading the Court" (3).

- "Organic" requirements: it is obvious that the rules governing liability applicable to judges must not affect either their independence or their impartiality.

- Procedural (formal) requirements: the strict requirements of fair trial and other procedural guarantees make it possible in the great majority of cases to ensure that the Court's findings correspond with the truth and that its decisions on the basis of these findings are in accordance with the law; furthermore the existence of several forms of appeal enable the party claiming to be prejudiced by a judgment in contentious proceedings to have this judgment withdrawn, altered or set aside; it is important that the system of public liability should not in some way constitute a new form of appeal in addition to those already provided for.

- Binding nature of the judgment: it is essential for the security of legal relationships that there should be an end to litigation but an action to enforce the judge's liability indirectly challenges the presumption that the decision is correct which applies to a judgment in contentious proceedings once it has become final and binding (res judicata).

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(1) See above, No. 1.
(2) See above, No. 5.
(3) P ARDANT, La responsabilité de l'Etat du fait de la fonction juridictionnelle, Paris 1956, p 174.

The specific nature of this liability extends to other judicial acts by reason of their close connection with judgments in contentious proceedings since they contribute to the establishment and enforcement of these judgments but only to a lesser extent. Thus, for example, the binding nature of a judgment can only apply to judgments in contentious proceedings and not to other judicial acts.

Because the specific nature of judicial acts applies in a lesser degree to acts other than judgments it seems to follow that rules governing public liability for judicial acts must necessarily provide, at least in some respects, for a difference in treatment depending on whether the judicial act causing the damage is or is not a judgment in contentious proceedings.

29. The minimum principles which in our opinion should govern public liability for judicial acts are contained in a set of rules which could be divided into three categories:

- rules relating to cases where the damage is caused by certain faults committed by the authority,

- those relating to cases where the damage is not connected with any fault committed by the authority,

- those which are applicable whether or not the damage arises from a fault committed by the authority.

A. Principle relating to cases where the damage arises from certain faults committed by the authority

30. In the case of acts by the public authority other than judicial acts it is generally admitted (as we have said above) that, as stated in the Appendix to Recommendation No. R (84) 15 on public liability, reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in relation to the injured person in a way which can reasonably be expected of it in law. (1)

On the other hand in the case of judicial acts, owing to their special nature, only some specific faults are liable to produce public liability.

Among the rules which should govern this public liability for fault, I consider a distinction should be made between:

- those which apply both to judgments in contentious proceedings and to other judicial acts,

- those which apply only to judicial acts other than judgments in contentious proceedings, and

- those which apply only to judgments in contentious proceedings.

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(1) Appendix to the Recommendation, Principle I, first sentence.

1. Rules governing public liability for fault which apply both to judgments in contentious proceedings and to other judicial acts

31. In the light of what has been said about the rules of international law, it would appear that, at least in two cases, public liability for fault, arising out of judicial acts, could be accepted by States, whatever the nature of the judicial act causing the damage.

In both cases this concerns the damage caused by a judicial act constituting an infringement of the obligations imposed by the European Convention on Human Rights: the first case relates to a person who is arrested or detained in conditions contrary to paragraphs (1) to (4) of Article 5; the second case is that of a person who suffers damage from a judicial act which the European Court of Human Rights or the Committee of Ministers has found to be contrary to the obligations imposed by the Convention.

These two cases were not expressly provided for in the Appendix to the 1983 draft recommendation.

In neither of these two cases would it be necessary to make a distinction depending on whether the judicial act is or is not a judgment in contentious proceedings and, if it is such a judgment, depending on whether or not it has become final or has or has not been withdrawn, altered or set aside by a final judgment (1). For public liability to arise in these two cases it is not necessary to prove the existence of intentional fault or gross negligence by the person causing the damage.

a. Public liability for damage suffered on account of arrest or detention in conditions contrary to paragraphs (1) to (4) of Article 5 of the European Convention on Human Rights

32. As already explained, Article 5 (5) of the European Convention only appears to impose a single obligation on the Contracting States, namely, to make legal provision for a person arrested or detained in conditions contrary to paragraphs (1) to (4) of that article to bring an action in damages against the person or persons responsible (2).

To make members of the legal service or their assistants personally liable for every arrest or detention which might turn out to have been ordered or continued in conditions contrary to paragraphs (1) to (4) of Article 5 of the European Convention would obviously risk hindering, or even dangerously paralysing, the action of the legal authorities in prosecuting criminal offences.

We therefore consider that the best means of reconciling the interests of public security and the fundamental rights of the individual would be to confer on everyone arrested or detained in conditions contrary to paragraphs (1) to (4) of Article 5 of the European Convention the right to obtain complete reparation for his damage from the public authorities.

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(1) The second case, however, implies that the injured party has, in accordance with Article 26 of the European Convention, exhausted all available domestic remedies according to the generally recognised rules of international law.

(2) See above paras 12 to 15.

The exercise of this right should not be subject to the existence of a prior decision by the European Court of Human Rights or the Committee of Ministers of the Council of Europe declaring that the judicial act complained of constituted an infringement of the above-mentioned provisions of the Convention.

b. Public liability in the case of damage suffered by reason of a judicial act which the European Court of Human Rights or the Committee of Ministers of the Council of Europe has declared contrary to the obligations imposed by the European Convention on Human Rights

33. The basic idea of the European Convention is that when a decision of the Court or the Committee of Ministers has declared an act, whether judicial or otherwise, of the respondent State to constitute a violation of the Convention that State has a duty to take, using its own procedure, the necessary measures to comply voluntarily and in good faith with the decision finding that there has been an infringement (1). In principle the decision should be carried out in the framework of the domestic legal system. Although the State which has been found to have committed a violation is required to take the necessary measures to comply with the decision it remains in control of the way these measures are taken. However, Article 50 of the Convention limits the discretionary power of the respondent State by impliedly determining the principles with which these measures must comply: the execution of the decision not only involves terminating the violation for the future but also requires that the consequences of the act which constituted the violation should be entirely made good.

On the internal plane, the ability of the injured party to bring an action in the national courts to obtain, where appropriate, the termination of the infringement found to exist by the Court or the Committee of Ministers and, at all events, complete reparation for the consequences of the violation depends entirely on the domestic law.

34. If the domestic law makes this possible the injured party's interests are best served by applying to the competent national authorities. It is only if the party has brought proceedings before the national authorities and after such proceedings, the respondent State has not put an end to the violation or has not made full reparation for the adverse consequences of the violation that the party will be entitled to apply to the Court for just satisfaction. However, it may be deduced from the fact that an application for just satisfaction is not considered by the Court as constituting a new application brought under Article 25 of the Convention (2), in particular that its admissibility is not subject to the prior exhaustion of domestic remedies prescribed by Article 26 of the Convention (3).

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(1) See above, paras 21 to 27.

(2) According to the Court, "the present case no longer relates to proceedings within Section III of the Convention but to the final phase of proceedings brought before the Court in accordance with Section IV on the conclusion of those to which the original application gave rise before the Commission" (De Wilde, Ooms and Versyp, 10 March 1972, series A, No. 14, p. 8, para 15 and Neumeister, 7 May 1974, series A, No. 17, p. 13-14, para 30). If such an application is brought before the Commission it may send it directly to the Court without examining it or treating it as a new application brought under Article 25 (Neumeister, cited above).

(3) De Wilde, Ooms and Versyp, 10 March 1972, series A, No. 14, p. 7-9, paras 15-16 and Guzzardi, 6 November 1980, series A, No. 39, p. 41, para 113.

The Court is therefore not required to declare inadmissible an application for just satisfaction brought before it on the ground that the applicant could have brought a similar application in a Court of the respondent State (1) (2).

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(1) De Wilde, Ooms and Versyp, 10 March 1972, series A, No. 14, p. 8-9 and 10, paras 16 and 20; Konig, 10 March 1980, series A, No. 36, p. 14-15, para 15 and Eckle, 21 June 1983 series A, No. 65, p. 7, para 13.

(2) It should further be noted that when the victim of a violation of the Convention found to exist by the Court decides first to apply for compensation on this ground to an authority of the respondent State the Court may, but is not bound to, stay its proceedings until the final decision by the national authority; in each case it considers whether the requirements of a sound administration of justice would or would not justify such a stay of proceedings (Eckle, 21 June 1983, series A, No. 65, p. 8, para 14). On the application of res judicata to the Court's decisions relating to the grant of just satisfaction in relation to the domestic courts, see in particular Brussels Regional Court, 16 January 1976, Yearbook of the European Convention on Human Rights XIX, 1976, p. 1118.

35. It is, however, possible that in domestic law the injured party is not entitled to bring an action before a national authority to put an end to the violation and obtain complete reparation for the consequences; for example, the domestic law may not allow the victim to apply to the courts for reparation of damage caused by a judicial act.

In this case, the injured party has no choice but to set in motion the international control machinery, which will then be operated either by the Court or the Committee of Ministers.

36. Thus a person who has suffered damage arising out of a judicial act infringing one of the rights and freedoms recognised by the European Convention may, by a legally binding decision of the Court or the Committee of Ministers, be granted just satisfaction in compensation for the damage suffered.

It is generally accepted that the protection of human rights shall be ensured in the first place by the domestic legal systems and that the international protection of these rights is of a subsidiary nature. It would seem to follow logically from this idea that a person injured by a judicial act which has been declared by the Court or the Committee of Ministers incompatible with one of the rights and freedoms recognised by the Convention could, without having to take a procedural bypass before one or other of these European control organs, exercise legal remedies in the national courts leading to a similar result in so far as the reparation of the damage suffered is concerned.

In these circumstances, it seems to us that every person who has suffered damage arising out of a judicial act which the European Court of Human Rights (1) or the Committee of Ministers of the Council of Europe (2) has declared contrary to the obligations imposed by the European Convention on Human Rights should be given the right to obtain from the public authorities complete reparation of this damage if the other domestic legal remedies or the nature of the violation allow only partial reparation to be made for the damage caused by the act.

In our opinion this should be a true right to reparation, whereas, as we have pointed out, the Convention confers both on the Court and on the Committee of Ministers a wide discretion in the matter of granting just satisfaction (3). But, as a subsidiary remedy, it could be provided that, in the case under consideration, the competent national authority would, if necessary, grant just satisfaction to the injured party.

2. Rules relating to public liability based on fault applicable to judicial acts other than judgments in contentious proceedings

37. The 1983 draft recommendation provided that in case of damage caused by a judicial act other than a judicial decision public liability should exist when the damage "arose from dolus or gross negligence on the part of the author of the act". (4)

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(1) European Convention, Article 50

(2) European Convention, Article 32

(3) See above, paras. 20 and 27

(4) 1983 draft Recommendation, Principle I, para. 1.

We feel able to agree with this principle subject to the following comments:

a. Public liability in the case of intentional fault (dolus)

38. Referring to the booklet "Certain aspects of Civil Liability" published in 1976 under the authority of the European Committee on Legal Co-operation, the commentary on the 1983 draft Recommendation defines intentional fault as "the fault committed with the intention of causing harm to another". (1)

A definition of this type is in our opinion too restrictive. Though one may admit that the fault committed with the intention of causing harm to another is an intentional fault it seems to us that other intentional faults also constitute "dolus"; the typical example of other intentional faults coming within this definition is in our opinion the fault committed, not with the intention of causing damage to another, but with fraudulent intent, ie the intention of procuring for oneself or a third person an unlawful advantage.

If we restrict ourselves to the definitions suggested in the above cited commentary there would, for example, be no public liability in the case of damage caused by forgery the perpetrator of which was exclusively motivated by a fraudulent intent; in fact, in such a case the damage would arise neither from "dolus" (because the intention with which the fault was committed was not to harm another person) nor from gross negligence(because this fault is not intentional).

In our opinion "dolus" should, for the application of this principle, be defined, if not as intentional fault, at least as fault committed with the intention either of causing harm to another or of procuring an unlawful (or unjustified) advantage for oneself or another (2).

b. Public liability in cases of gross negligence

39. The idea that public liability may be incurred for any form of gross negligence by the person committing the act appears to have been accepted by the majority of States, provided that the judicial act complained of is not a judgment in contentious proceedings.

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(1) Doc. CDCJ (83) 5, p. 9, paragraph 13.

(2) One might also ask whether the concept of "dolus" should not imply fraudulent practices or machinations.
In Belgian law, the "dolus" or fraud required by Section 1140 N° 1 of the Court's Act for an action against a judge for misuse of authority requires fraudulent practices or machinations by the person concerned either to pervert the course of justice or to favour or harm a given party or to advance a personal interest (cass., 27 June 1977, Pas., 1977, I, 1101; see also cass., 7 November 1949, ibid., 1950, I, 123).

According to the definition which in our opinion may be considered traditional gross negligence is such gross and excessive fault that it would not be committed by a reasonable person. This is fault with regard to which the circumstances in which it was committed impose the conclusion that it is particularly serious, and indeed, inexcusable. (1) Obviously we cannot here review the numerous controversies to which this traditional definition has given rise.

The commentary on the 1983 draft Recommendation appears to discard this traditional definition by stating that "gross negligence is non-intentional fault which would not be committed by a person showing even a minimum degree of care". (2)

This last definition is not entirely unambiguous, principally on account of the two meanings of the word "care". The French word "diligence" can be understood in two meanings. In the wider sense it is synonymous with care, zeal, attention, vigilance and prudence; in this sense, gross negligence would be unintentional fault which would not be committed by a person exercising a minimum of care, zeal, attention, vigilance and prudence. In a restricted sense the word "diligence" suggests the idea of time and time limits; it is synonymous with promptness, speed, readiness, zealous haste, effective rapidity; in this sense gross negligence would only cover non-intentional negligence which would not be committed by someone who had shown a minimum of promptness, speed, readiness, zealous haste, and effective rapidity. If the definition suggested in the above mentioned commentary is to be chosen it should in our opinion be interpreted in the wide sense mentioned above.

3. Rules governing public liability based on fault, applicable to judgments in contentious proceedings

40. In the scheme of the 1983 draft Recommendation public liability would only arise in the case of "a judicial decision" if two conditions were satisfied:

- the damage must have been caused by dolus or gross negligence;

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(1) J.F. COUZINET, "La notion de faute lourde administrative", Revue de droit public et de la science politique, 1977, 283 et seq.

(2) Doc. CDCJ (83) 5, p. 9, para. 13.

- the act must have been withdrawn, modified or annulled by a final decision (1).

This system has provoked considerable resistance on the part of the States.

As regards the first of the two conditions, several States are not willing to accept that public liability for judgments in contentious proceedings should be incurred for gross negligence, because the application of this last concept to this type of judicial act might well turn out to be particularly difficult and finally end up in erroneous judgments by the courts being made a ground for public liability. Thus the fear has been expressed that this liability might be incurred merely on the ground that it was considered inexcusable for a judge not to have taken account of a particular statutory provision or regulation or to have been ignorant of certain precedents etc.

As regards the second condition, it was chiefly argued that it is where there are no appeals or no longer any appeals available which make it possible for the judgment of the trial court to be submitted to another court that the right to bring an action for public liability is most necessary and that this right appears much less justified when the judicial decision affected by an intentional fault or gross negligence has been withdrawn, modified or annuled. It has also been pointed out that, as drafted, the principle does not expressly require that the judgment which has been withdrawn, altered or annulled should be in fact erroneous so that a provisional decision later withdrawn, modified or annulled by reason of new facts could fall within the scope of this principle.

These criticisms have led us to suggest that the distinction should be made between judgments in contentious proceedings depending on whether or not they have been withdrawn, modified or annulled by a final decision for the violation of an established legal rule.

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(1) Principle I in this draft was worded as follows:

"Public liability in this draft was worded in respect of damage caused by a judicial act and which arose from dolus or gross negligence on the part of the author of the act.

When the act in question is a judicial decision, liability should arise only if the act has been withdrawn, modified or annulled by a final decision."

Owing to the way in which it is drafted, this wording seems ambiguous with regard to the scope of the distinction it establishes. At first sight the distinction might be interpreted as creating two types of cases giving rise to public liability: firstly those where the damage is caused by a judicial act if it arises from dolus or gross negligence on the part of the person committing it and secondly those in which damage is caused by a judicial act in the form of a judicial decision if the act has been withdrawn, modified or annulled (without dolus or gross negligence being required). It is only on reading the commentary that it becomes clear that, as regards judicial acts in the form of a judicial decision, the condition specified in paragraph 2 must exist in addition to dolus and gross negligence (CDCJ (83) 5, p. 9, para. 15).

a. Judgments in contentious proceedings withdrawn, modified or annulled by a final decision for the violation of an established legal rule

41. The first category of judgments in contentious proceedings is thus that of judgments which have been withdrawn, modified or annulled by a final decision for the violation of an established legal rule.

As a result of the withdrawal, modification or annulment these judgments have ceased to be binding (1). Public liability for such acts, far from being incompatible with their binding nature, will appear in numerous cases to be the logical consequence of the final decision by which they are withdrawn, modified or annulled.

Though it is true that by obtaining the withdrawal, modification or annulment of the judgment complained of a litigant who claims to have suffered unlawful damage owing to this judgment may have put an end to this damage, the fact remains that the decision withdrawing, modifying or annulling the judgment in question has not necessarily removed or made reparation for the damage which he may have suffered during a certain time.

The decision withdrawing, modifying or annulling the judgment must be final. In relation to a court, the concept of "final decision" (décision définitive) can have several different meanings (2); by "final decision" we should here understand a final decision in the meaning usually given to this expression in the terminology of the Council of Europe (3).

In order to meet one of the objections raised in the preceding paragraph it is provided that the final decision must have withdrawn, altered or annulled the original judgment because the latter had violated an established legal rule. This last expression is taken from Principle I in the Appendix to Recommendation No. R (84) 15 on public liability. As in the case of the application of this principle, "established legal rule" should be understood to include the rules known at the time when the act was performed, whether they take the form of legislation or that of judicial precedent (4).

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(1) As mentioned in the commentary to the 1983 draft Recommendation res judicata "prevents, when a decision is regarded as definitive and enforceable, proceedings designed to show that such a decision was defective because of dolus or gross negligence, so that it should occasion reparation" (CDCJ (83) 5, p. 9, para. 16).

(2) It may mean an unimpeachable decision ie a decision which is not subject to any form of appeal, as opposed, in particular, to a judgment by default, which is subject to an application to set aside, and to a decision at first instance subject to appeal. A "final decision" (décision définitive) may also mean a decision which leaves a judge functus officio on a disputed question as opposed to an interlocutory decision which orders a preliminary measure in the preparation for trial or makes temporary provision for the position of the parties. The expression "final judgment" (décision définitive) may also mean a decision which, having dealt with all matters contained in the statement of claim, renders the judge functus officio on all the matters in dispute.

(3) See supra, p. 10, note 1 and p. 23, note 1.

(4) See commentary in the above cited booklet entitled "Public Liability", p. 14, para. 19.

42. Apart from the two cases covered by the rules dealing with public liability based on fault which apply to all judicial acts (1), the reparation of damage caused by judgments in contentious proceedings of this category should, we consider, be guaranteed in two cases:

- when there is intentional fault on the part of the person performing the act;

- when the person performing the act has infringed the obligations imposed by the European Convention on Human Rights and, in the circumstances of the case, this infringement must be regarded as constituting gross negligence.

Although based on the violation of an established legal rule by the judgment complained of, the final decision withdrawing, modifying or annulling the judgment should not necessarily indicate that it was justified by one or other of the two above-mentioned circumstances: but it would allow the party claiming to have suffered damage to prove that the judgment withdrawn, modified or annulled was vitiated by an intentional fault or an infringement of the European Convention which amounted to gross negligence (2).

In the case where the person committing the act complained of has been guilty of an intentional fault (dolus) there would not appear to be any particular difficulty, subject to the remarks already made above in relation to the definition of "dolus" (3).

In view of the numerous objections which the idea of making gross negligence a cause of public liability for this category of judicial acts has provoked, we feel it necessary to accept in principle that the gross negligence of the person performing the act would not be a cause of a public liability.

Nevertheless, this liability would be involved when the damage arose from an infringement of the European Convention on Human Rights which, having regard to the circumstances of the case, would appear to constitute gross negligence.

43. It follows that in the proposed system a judgment in contentious proceedings which has been withdrawn, modified or annulled by a final decision for the violation of an established legal rule may give rise to public liability if there has been an infringement of the European Convention on Human Rights in four cases:

- when the person committing the act has committed an intentional fault;

- when an infringement of the European Convention amounts to gross negligence;

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(1) See above paras. 31 to 36.

(2) See the commentary on the 1983 draft Recommendation, CDCJ (83) 5, p. 10, para. 17.

(3) See above, para. 38.

- when the fault consists in a violation of paragraphs (1) to (4) of Article 5 of the European Convention (1);

- when the infringement of the European Convention has been found to exist by decision of the European Court of Human Rights (Article 50 of the Convention) or by the Committee of Ministers of the Council of Europe (Article 32 of the Convention) (2).

b. Other judgments in contentious proceedings

44. The principles proposed in the 1983 draft Recommendation made no provision for public liability for this category of judgments in view of the necessary consequences of their normally binding nature.

This leaves us with the position that, as already mentioned, public liability may be particularly necessary precisely in those cases where no appeal exists or an appeal no longer exists which makes it possible to submit a judgment in contentious proceedings to the control of another court.

I am, therefore, here proposing a system of compromise between these two contradictory requirements.

In the same way as judicial acts other than judgments in contentious proceedings, judgments in contentious proceedings belonging to this second category may give rise to public liability in the two cases already mentioned where the damage originates in an infringement of the European Convention on Human Rights:

- when the fault consisted in a violation of paragraphs (1) to (4) of Article 5 of the Convention (3), and

- when the fault has been found to exist by a decision of the European Court of Human Rights (Article 50 of the Convention) or of the Committee of Ministers of the Council of Europe (Article 32 of the Convention) (4).

B. Principle relating to cases where the damage is not connected with any fault committed by the authority

45. In the scheme of Recommendation No R (84) 15 on public liability, even if the damage is unconnected with a fault committed by the public authorities, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one

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(1) See above paras. 12 to 15 and 32.

(2) See above paras. 21 to 27 and 33 to 36.

(3) See above paras. 12 to 15 and 32.

(4) See above, paras. 21 to 27 and 33 to 36.

person or a limited number of persons have suffered damage and the act was exceptional or the damage was an exceptional result of the act (1).

Without adopting this principle as it stands, but adopting a similar approach, the Appendix to the 1983 draft Recommendation provided (in Principle II) that public liability for judicial acts would occur in two cases where persons were deprived of their freedom if it would be manifestly unjust to allow the injured person alone to bear the damage: firstly, in the case of custody pending trial not followed by a conviction and secondly, in the case of imprisonment imposed by a final conviction which was subsequently annulled after reconsideration (retrial).

In our opinion the first case may be accepted as it stands but the second should be extended to cover the wider case where a final criminal conviction is subsequently set aside or pardon granted on account of new facts which prove that there has been a miscarriage of justice.

1. Rules relating to public liability in the absence of fault applicable to detention on remand not followed by a conviction

46. Subject to some comments which we will make at a later stage, we feel able to agree with Principle II (a) in the Appendix to the 1983 draft Recommendation which reads: "public liability should, in addition, exist in respect of damage suffered in the case of a person who has spent a period in custody pending trial but is subsequently not convicted ... if it would be manifestly unjust to allow the injured person alone to bear the damage".

From the commentary on this draft it appears:

- that the expression "detention on remand" must be interpreted as in Committee of Ministers Recommendation No R (80) 11, namely custody pending a trial which has been authorised or ordered by the judiciary (3);

- that the condition relating to the manifestly unjust nature of the situation in which the injured person finds himself when obliged to bear the damage alone, makes it possible to take into consideration a whole series of variables which can determine the extent of the reparation, for instance, acquittal of the person concerned for want of evidence (in this case reparation could be refused), duration of the detention on remand (a very short period might not give rise to reparation), the actual behaviour of the victim etc (4).

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(1) Appendix to the Recommendation, Principle II, para. 1. Two limitations are imposed on this principle: firstly, its application may be limited to certain categories of acts (Principle II, para. 2) and secondly, the reparation for which it provides may cover only part of the damage, on the basis of equitable principles (Principle V).

(2) See below para. 48.

(3) CDCJ (83) 5, p. 10, para. 22.

(4) CDCJ (83) 5, p. 10, paras. 20-21.

47. Thus detention on remand preceding trial authorised or ordered by the courts can, in the system we are contemplating, give rise to public liability either on account of certain faults committed by the authority or in the absence of such faults.

The faults giving rise to public liability on account of detention on remand are:

- failure to comply with paragraphs (1) to (4) of Article 5 of the European Convention on Human Rights (1);

- other violations of the European Convention when they have been found to exist by a decision of the European Court of Human Rights (Article 50 of the Convention) or of the Committee of Ministers of the Council of Europe (Article 32 of the Convention) (2);

- intentional fault (dolus) (3);

- gross negligence if the act causing the damage is a judicial act other than a judgment in contentious proceedings (4);

- the violation of a provision of the European Convention other than Article 5 amounting to gross negligence if the act causing the damage is a judgment in contentious proceedings (5).

48. Two further remarks must, we consider, be added to the commentaries cited above (6) on the rules governing public liability without fault, applicable to detention on remand not followed by conviction.

- In interpreting the condition relating to the manifestly unjust nature of the situation in which the injured person finds himself when he is required to bear the damage alone, account should be taken not only of circumstances involving private interests but also those involving the public interest.

- Similarly it must be evident that the circumstances mentioned in these commentaries are merely examples and that there may be other circumstances to which regard should be had. Thus, we consider that public liability should not arise in particular when detention on remand is followed by a measure of social protection such as preventive detention or when the prosecution was terminated by limitation or as a result of the death of the accused during the investigation or the trial.

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(1) See above, paras. 12 to 15 and 32.

(2) See above, paras. 21 and 27 and 33 to 36.

(3) See above, paras. 38 and 42

(4) See above, para. 39.

(5) See above, para 42.

(6) See above, para 46.

2. Rules governing public liability in the absence of fault applying to convictions which have been set aside or in relation to which a pardon has been granted as a result of new facts establishing a miscarriage of justice

49. The system put forward in the 1983 draft Recommendation may be compared with that in Articles 14 (4) of the International Covenant and 3 of Protocol No 7 to the European Convention (1), although there are certain differences which relate to the conditions governing both the right to reparation and the extent of the reparation and the way in which it is granted.

50. On two points at least the rules in the draft Recommendation concerning the conditions governing the right to reparation seem to provide a lower level of protection for injured persons than that guaranteed by the International Covenant and the Protocol to the European Convention.

- Firstly, in the draft the person concerned must have undergone imprisonment imposed by the conviction whereas in the Covenant and the Protocol to the Convention the person must have suffered a punishment as the result of the conviction (normally, but not necessarily, imprisonment).

- Secondly, in the draft the conviction must have been subsequently annulled after reconsideration (retrial) whereas in the Covenant and the Protocol the right to compensation is available even if the conviction has not been set aside but a pardon has been granted.

51. On two other points it is difficult to assess whether the system contained in the draft or that in the Covenant and the Protocol to the Convention in fact offers more extensive protection to injured persons.

This applies to the condition in the project relating to the manifestly unjust nature of the situation in which the injured person finds himself if he has to bear the damage alone; this condition does not appear either in the Covenant or in the Protocol to the Convention; but these two instruments exclude the right to compensation if it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the convicted person (2).

The position is the same as regards the rules relating to the manner and extent of the reparation; the reparation provided for in the draft Recommendation may cover only part of the damage, on the basis of equitable principles, whereas under the Covenant and the Protocol to the Convention the compensation must be provided in accordance with the domestic law of the State concerned.

52. From two points of view, however, the system in the draft seems to provide more protection for the victims than that in the Covenant or the Protocol to the Convention: in the draft Recommendation,

- though the person must have been finally convicted, it is not required as in the Covenant and the Protocol to the Convention that this conviction should be a criminal conviction.

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(1) See above, paras. 16 to 18.

(2) Compare Principle III in the Annex to the draft Recommendation which provides that "if the victim contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed." See also para. 55 below.

- unlike the Covenant and the Protocol to the Convention, it is not required that the conviction has been reversed on the specific ground that a new or newly discovered fact proves that there has been a miscarriage of justice.

53. The fact that the International Covenant is already binding on a considerable number of European States, the probability that the States Parties to the European Convention will ratify its Protocol No 7 within a few years, the difficulties which might be caused by an instrument whose provisions vary in a number of points from corresponding provisions of the Covenant and Protocol No 7 to the Convention, the relatively small additional protection which such an instrument would give to injured persons are so many reasons which have convinced us that, in the case of a person who has undergone punishment as a result of a miscarriage of justice, the only rule of public liability which should be accepted is that stated in Articles 14 (6) of the Covenant and 3 of Protocol No 7 to the European Convention.

Although it has already been stated in these international instruments, the above-mentioned rule could in our opinion be included in a set of principles relating to public liability for judicial acts: apart from the fact that these instruments do not yet bind all member States of the Council of Europe, it should be remembered that the solution given to the problem of the position of the rules contained in these instruments in relation to the domestic legal system of the Contracting States varies from State to State and depends on whether or not they have been incorporated into the domestic legal system and if so whether they are treated as being of direct application or not and also on the precedence they are given in the case of a conflict with the rules of domestic law.

C. Principles which are applicable whether or not the damage arises from a fault committed by the authority

54. These principles relate to the contribution of the victim to the damage, the extent of the reparation and the prohibition of discrimination.

They are based on Principles III, IV and V set out in the Appendix to the 1983 draft Recommendation.

1. Principle concerning the victim's contribution to the damage

55. "If the victim contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed" (Principle III in the Appendix to the 1983 draft Recommendation).

We feel able to support this principle (1).

It follows that the existence and extent of the public liability may depend on the conduct of the victim.

The expression "accordingly" indicates there must be a certain proportionality in the relationship between the "behaviour of the author of the damages and the behaviour of the victim" (2).

2. Principle relating to the extent of the reparation

56. The system proposed is identical to that contained in Recommendation No R (84) 15 and the 1983 draft Recommendation (3).

Public liability in cases where a fault (4) has been committed by the authority should involve complete reparation (5), the determination of heads of damage, and the nature and form of the reparation being a matter for the domestic law. From the fact that reparation must be complete it cannot be deduced that it must necessarily take the form of pecuniary compensation: it may also be effected by any other appropriate means (6).

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(1) It should be noted that this principle differs from Principle III in Recommendation No R (84) 15 on public liability, which reads: "If the victim has, by his own fault or by his failure to use legal remedies contributed to the damage, the reparation of the damage may be reduced accordingly or disallowed.

The same should apply if a person, for whom the victim is responsible under national law, has contributed to the damage".

The commentary on the 1983 draft Recommendation explains the implication of, and reasons for, these differences:

The latter recommendation in fact takes into consideration only negligence of the victim (and that of persons for whom he is responsible) and failure to make use of legal remedies, whereas under the terms of the present recommendation any kind of behaviour, whether involving negligence or not, can result in compensation being reduced. The reason is that in the particular area of damage caused by judicial acts such contribution can consist of behaviour (for example, failure to disclose certain facts) which cannot be described as negligent under the law of certain States but which nonetheless warrants the compensation being reduced." (doc. CDCJ (83) 5, p. 11, para 24).

(2) Commentary on 1983 draft Recommendation, CDCJ (83) 5, p. 10, para 23.

(3) Principle V of Recommendation No R (84) 15 and Principle IV of the 1983 draft Recommendation provide in identical terms:

"Reparation under Principle I should be made in full, it being understood that the determination of the heads of damage, of the nature and of the form of reparation falls within the competence of national law. Reparation under Principle II may be made only in part, on the basis of equitable principles."

(4) See above, paras. 30 to 44.

(5) But see above, para. 36 in fine.

(6) Appendix to Recommendation No R (84) 15, Scope and definitions, para. 1.

In the case of public liability where no fault has been committed (1) the reparation may cover only part of the damage, on the basis of equitable principles

3. Principle relating to the prohibition of discrimination

57. According to Principle VIII of Recommendation No R (84) 15, which is identical with Principle IV of the 1983 draft Recommendation, "the nationality of the victim should not give rise to any discrimination in the field of public liability."

In our opinion the prohibition of discrimination should not be limited to discrimination based on the victim's nationality. It is difficult to see why the principles governing liability for judicial acts should not also be applied without discrimination based on sex, race, colour, language, religion, political or any other opinions, social origin, membership of the national minority, financial situation, birth or any other situation (2).

The principle of non-discrimination should, in our opinion, state in substance that the enjoyment of the rights to which a victim is entitled under the rules governing public liability for judicial acts must be guaranteed without any discrimination based (inter alia) on sex, race, colour, language, religion, political or any other opinions, national or social origin, membership of a national minority, financial situation, birth or any other situation.

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(1) See above, paras. 45 to 53.

(2) Cf. Articles 14 of the European Convention and 2(1) of the International Covenant.

CONCLUSIONS

58. We, therefore, consider that the essential elements of a system of public liability for judicial acts correspond with the minimum principles set out below, by which the member States of the Council of Europe could be guided in their law and practice:

Principle I

Reparation for damage caused by a judicial act due to the fault of the person (or body) performing the act should be guaranteed in the following cases:

a. When as the result of a judicial act a person has suffered damage because he has been arrested or detained in conditions contrary to the provisions of Article 5 (1) to (4) of the European Convention on Human Rights (1);

b. When a decision of the European Court of Human Rights or the Committee of Ministers of the Council of Europe under Articles 50 or 32 of the European Convention on Human Rights has declared that a judicial act was entirely or partially incompatible with the obligations contained in that Convention and the other domestic remedies or the nature of the violation only make it possible to make good the damage caused by this act to a limited extent (2);

c. When the damage caused by a judicial act, other than a judgement in contentious proceedings, arises out of an intentional fault or gross negligence of the person (or body) performing the act (3);

d. When the damage caused by a judgement in contentious proceedings which has been withdrawn, modified or set aside by a final decision because it violated an established legal rule arises either from the intentional fault of the person (or body) performing the act or in a failure by the person (or body) performing the act to comply with a provision of the European Convention on Human Rights other than Article 5 (1) to (4) which in the circumstances constitutes gross negligence (4).

Principle II

Even in the absence of the faults referred to in Principle I the reparation of the damage caused by a judicial act should be guaranteed in the following cases:

a. When the damage arises from detention on remand not followed by a conviction and it would be manifestly unjust if the victim were left to bear the damage alone (5);

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(1) See above paras 12 to 15 and 32.

(2) See above paras 21 to 27 and 33 to 36.

(3) See above paras 37 to 39.

(4) See above, paras 41 to 43.

(5) See above, paras 46 to 48.

b. When the damage arises from a sentence served as a result of a final conviction and this conviction has later been set aside or a pardon granted because new facts or newly revealed facts proved that there has been a miscarriage of justice, unless it is proved that the failure to disclose the unknown fact in time is due in whole or in part to the fault of the convicted person (1).

Principle III

If the victim has contributed to the damage the reparation may be reduced or refused (2).

Principle IV

The reparation provided for in Principle I should be complete, the heads of damage and the nature and type of reparation being a matter for domestic law.

The reparation provided for in Principle II may cover part of the damage only, as may be required by equitable principles (3).

Principle V

The victim's rights deriving from the rules on public liability for judicial acts should be guaranteed without any discrimination based (inter alia) on sex, race, colour, language, religion, political or any other opinions, national or social origin, membership of a national minority, wealth, birth or any other situation (4).

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(1) See above, paras 16 to 18 and 49 to 53.

(2) See above, para 55.

(3) See above, para 56.

(4) See above, para 57.

LIABILITY OF PUBLIC AUTHORITIES AND SEPARATION OF POWERS

by

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The principle of the legal liability of public authorities is accepted in democratic systems. Since separation of powers is one of the foundations of democracy, it is important that as far as their liability is concerned, public authorities should be subject to the jurisdiction of a judge, who is as independent of them as possible.

By referring specifically to legal liability, I wish to stress that political liability is not sufficient and that there must be liability organised by the law and sanctioned by a judge. Democracy is a principle of political life which, being based essentially on the idea of representation of the will of the people, may itself be divided into various particular principles such as separation of powers, the amenability of public authorities to the law - what is known as the principle of the rule of law - and respect for the rights of the individual. The purpose of legal provisions is to put these principles into operation and, in particular, ensure the non-contractual liability of public authorities.

This liability takes several forms. More often than not, the liability of public authorities is conceived or only as the liability arising from the acts of the administration. When speaking of the liability of public authorities, we mainly, or sometimes even solely, have in mind the liability of the administration. It is in fact the administration which, being the organ of executive power with which it is, as it were, co-extensive, is most likely to cause damage to others in the performance of its functions. However, it must be borne in mind that damage may also be caused in the exercise of judicial or quasi-judicial powers as well as in the exercise of legislative powers.

It is customary to draw a distinction between (a) proceedings involving disputes about rights, notably the right to obtain reparation for damage caused by the public authorities ("individual" proceedings) and (b) proceedings not involving rights but aimed at improving the functioning of the administration, through the cancellation of improper administrative acts or through the restoration of a state of affairs more in keeping with an equitable combination of public interest and private interests in the case of exceptional damage due to violation of the equality or balance between citizens vis-à-vis public obligations ("general" proceedings).

In some systems, the administration comes under a single judge, who has jurisdiction for both "individual" and "general" proceedings. This is the case in France, where the administration is, with a few exceptions, amenable to its own judges - the administrative courts and the Conseil d'Etat - whether the proceedings are aimed at establishing some form of liability (whether fault-free

(1) The author of these observations is a member of the Council of Europe's Committee of Experts on Administrative Law. He was Chairman of the committee during the last stages of work on the draft Recommendation on Public Liability (for administrative acts) and at the meeting at which the draft recommendation relating to public liability for judicial acts was drawn up. He wishes to make it clear that these observations represent his personal view and that, even when they are in line with the ideas of the committee, they should in no way be regarded as an official expression of the committee's thinking.

or otherwise) or at securing the cancellation of a measure on the grounds of ultra vires action. In other systems, such as that of the United Kingdom, the administration is amenable to the same judges as private individuals. In yet other systems it is sometimes amenable to the same judges as private individuals and sometimes to judges of its own.

In Belgium, the administration is, in questions of liability, amenable sometimes to the courts and sometimes to the Conseil d'Etat: it comes under the courts in the same way as private individuals in the case of damage caused through its own fault or in the case of fault-free infringement of civil rights; it comes under the Conseil d'Etat in the case of exceptional damage due to violation of the equality or balance between citizens vis-à-vis public obligations. Since in the absence of administrative courts, the Conseil d'Etat is the administration's only specific judge with general jurisdiction, the administration is amenable to that authority in liability proceedings of that kind as well as in annulment or ultra vires proceedings.

The principle of separation of powers, viewed in terms of the judges with jurisdiction over the administration, is thus implemented in various ways. The method of implementation matters little provided that, as already mentioned, the judge is institutionally independent.

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It is also possible that, in the matter of non-contractual liability, different rules will be applicable to private individuals and to the administration, even when, by its nature, the cause of the liability is the same. It is true that in the case of liability due to violation of the equality or balance between citizens vis-à-vis public obligations only the public authorities, and more often than not the administration, may be involved. It is in cases where liability stems from a fault, or more generally in cases where the public authorities are involved in a dispute over rights, that the question arises as to whether they are subject to the same rules as private individuals. In France, the Blanco judgment (Tribunal des conflits, 8 February 1973) clearly ruled that the State's liability cannot be governed by the Civil Code rules applicable to private individuals. This no doubt meant, at the moment when the judgment was delivered, that the judge would be in a position to apply to the administration rules less severe than those applicable to private individuals, but case-law has evolved in such a way that the effect of the principle today is that the judge may hold the administration liable in cases where the rule applicable to private individuals would not permit him to do so. In Belgium, even though the Constitution makes no distinction between public authorities and private individuals in respect of disputes over rights, the courts were for a long time reluctant to treat the administration and private individuals on the same footing in the application of Civil Code provisions regarding non-contractual liability.

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In any case, liability of the administration and of public authorities in general has specific characteristics, both from the standpoint of the courts that have jurisdiction over them and in terms of the rules applicable to them.

Being aware of the importance of the matter, the Council of Europe thought it appropriate to examine the question of public liability, that is to say the question of the obligation for public authorities to make amends for damage arising out of their acts, in connection first with administrative acts, then with judicial acts.

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The instruments drawn up by the Council of Europe

The first work to be done in the Council of Europe on administrative acts in general was that entrusted in 1971 to the sub-committee of experts on the protection of the individual in relation to the acts of administrative authorities, which was subsequently designated the Committee of Experts on Administrative Law.

The first text to appear on the subject was Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities, which was adopted by the Committee of Ministers on 28 September 1977. It was followed by Recommendation No. R (80) 2 on exercise of discretionary powers by administrative authorities, which was adopted by the Committee of Ministers on 11 March 1980.

The Council of Europe's 9th Colloquy on European Law, held in Madrid from 2 to 4 October 1979, was concerned with "The liability of the state and regional and local authorities for damage caused by their agents and administrative services" (see Proceedings of the Colloquy, Council of Europe, Legal Affairs, Strasbourg, 1981). This subject came within the area of responsiblity and activity of the Committee of Experts on Administrative Law, which was instructed to draw up appropriate instruments dealing with specific aspects of state liability. As a result of the committee's work, Recommendation No. R (84) 15 relating to public liability was adopted by the Committee of Ministers on 18 September 1984. This recommendation deals mainly with liability for administrative acts.

In the meantime, the Committee of Experts on Administrative Law continued its work by preparing a draft recommendation relating to public liability for judicial acts. This draft was completed in March 1983 and submitted to the European Committee on Legal Co-operation, which held it in abeyance in the belief that the matter merited broader and more detailed deliberation and proposed making it the subject or one of the subjects of a Colloquy on European Law.

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Liability for administrative acts

Recommendation No. R (84) 15 relating to public liability (1) defines public liability as "the obligation of public authorities to make good the damage caused by their acts, either by compensation or by any other appropriate means". The authors of the recommendation delimited its scope by defining the act as any action or omission which is of such a nature as to affect directly the rights, liberties or interests of persons, and by specifying that the acts covered are normative acts carried out in the exercise of regulatory authority, administrative acts which are not regulatory, and physical acts. It was also specified that amongst the acts covered were those which, carried out in the administration of justice, were not performed in the exercise of a judicial function.

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(1) When this recommendation was adopted the Swedish delegate reserved the right of his government not to comply with it, while the delegates of Denmark and Norway reserved their government's right not to comply with principle II.

The recommendation starts by drawing a distinction between two types of liability.

Principle I refers, essentially, to liability arising from a fault: "Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule".

The fault must be a breach of a rule of law, which precludes proceedings over a mere difference of interpretation as well as proceedings relating to the application of administrative instructions. Furthermore, a presumption of fault arises from the violation of a rule of law, which is called an established legal rule; this precludes any interpretations that may be produced by doctrine or case-law after the prejudicial act occurred. Such presumption, even if it can be rebutted by contrary evidence, is important from the point of view of the burden of proof. It is also important in that it acknowledges the concept of a fault by an administrative department, without requiring the injured person to identify the particular agent or agents who committed the prejudicial act. A corollary of this appears in Principle IV, where it is stated that "the right to bring an action against a public authority should not be subject to the obligation to act first against its agent".

In the cases of fault-based liability referred to in Principle I, reparation is due in full in accordance with the first paragraph of Principle V.

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Principle II establishes a system of liability in the absence of any fault: "Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act". The cause of liability is here not the fault but violation of the equality or balance between citizens vis-à-vis public obligations.

In the cases referred to in Principle II, the reparation may, under the second paragraph of Principle V, be made only in part, on the basis of equitable principles.

It should be noted that in some States there may be cases where fault-free liability is equated with liability arising from a fault and may give rise to full reparation: such is the situation in Belgium in cases where the damage is due to a fault-free infringement of civil rights.

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Liability for judicial acts

Liability for judicial acts does not fundamentally differ from liability for administrative acts. In both cases the liability of the public authorities is at issue.

Faults are human and are just as likely to occur in the judicial field as in the administrative sphere. The theory that it is only fair to make amends for exceptional damage due, in the absence of any fault, to violation of the equality or balance between citizens in relation to public obligations may be applicable to the performance of judicial functions in the same way as to the exercise of administrative functions.

It is true that the organisation of judicial systems is such that the risk of damage due to a fault on the part of the judge is limited. There are rules of procedure, and several branches of the judiciary are involved, some being responsible for prosecuting offenders or proposing solutions or investigating causes, others being responsible for deciding or judging cases in the true sense. The existence of a hierarchy of courts is also a guarantee of better justice. Through appeal and cassation procedures such a system enables errors to be corrected and amends to be made for faults committed by judges whose decisions are contested.

The fact remains that judicial remedies need to be available against liability for damage caused in the exercise of judicial functions. Such a system of liability is by no means incompatible with the qualities of independence which form part of the status of members of the judiciary. Indeed, it can only strengthen the public's confidence in its judges by protecting it from any faults and errors the judges may make.

In determining the scope of a recommendation on public liability for judicial acts, it is difficult to avoid a problem of tautology. A judicial act has been defined in the draft recommendation as any action or omission of a judicial nature occurring in the administration of justice, and administration of justice has been defined as the exercise of the judicial function by the public bodies which are institutionally entrusted therewith. Administrative acts performed in the exercise of judicial functions (or in the course of the administration of justice) are thus excluded; only acts forming part of the judicial process are referred to. Similarly, only acts carried out by public bodies organically or institutionally responsible for performing judicial functions are covered.

The concepts of "justice" and "judicial" are not defined; they are used in their commonly accepted meanings, which does not preclude inevitable shades of meaning. Defining them precisely would be a perilous feat impossible to achieve in a few words.

The important point is to lay down the general principle that public authorities are liable for certain damage caused in the exercise of the judicial functions, independently of national systems' rules which may or may not allow persons taking part in the judicial process to be held individually liable.

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A study of the subject suggests the same distinction as with regard to liability for administrative acts, ie liability stemming from a fault and liability free from any fault.

Principle I of the draft instrument deals with liability based on a fault, referring to damage originating through dolus or gross negligence. It is worded as follows:

"Public liability should exist in respect of damage caused by a judicial act and which arose from dolus or gross negligence on the part of the author of the act".

"When the act in question is a judicial decision, liability should arise only if the act has been withdrawn, modified or annulled by a final decision".

The concepts of dolus and gross negligence are defined in a Council of Europe report entitled "Certain Aspects of Civil Liability", drawn up in 1976 by the Sub-Committee on Fundamental Legal Concepts set up by the European Committee on Legal Co-operation. These definitions are as follows:

"- Dolus or intentional harm is a fault committed with the intention of causing harm to another person. These terms also cover fault which is committed by a person without the intention to cause damage but in the knowledge that such would probably be the consequences of his behaviour (dolus eventualis) which he accepts. Gross negligence is non-intentional fault which would not be committed by a person showing even a minimum degree of care".

It is natural to refer to these definitions, whilst no doubt regarding them as purely indicative and leaving it to national courts to spell them out in greater detail.

As the draft covers not only positive acts but also omissions, it is also designed to deal with denials of justice and unreasonable delay in the adoption of certain measures.

The second paragraph of Principle I implies a distinction between acts which are genuine judicial decisions and those which do not have that character but are nonetheless part of the judicial process, whether they are carried out by actual holders of judicial functions or by their assistants acting on their instructions or under their authority. This distinction is admittedly unclear but it is nevertheless necessary because of the existence in certain States of systems where acts, without constituting judicial decisions, in the strict sense, are regarded as forming part of the judicial process or even of the exercise of judicial functions and are not therefore governed by the rules of liability applicable to administrative acts.

In the case of judicial decisions, liability for dolus or gross negligence would arise only if the decision complained of had first been the subject of a judicial procedure resulting in its withdrawal, modification or annulment. In this way, the impropriety of the decision would have to be recognised by the judicial authority itself before a liability action could be brought. This is a way of obliging the injured party to avail himself of the remedies offered to him by the various rules of procedure and of not allowing him to bring a liability action until the matter has become res judicata. The disadvantage of the system is that, if there is no remedy which permits the withdrawal, modification or annulment of the decision complained of, the principle would be of no assistance.

As for the form of reparation, liability based on a fault would give rise, as in the case of administrative acts, to full reparation for the damage. This is provided for in the first paragraph of Principle IV of the draft.

Principle II of the draft deals with liability in the absence of any fault. It is worded as follows:

"Public liability, in addition, should exist in respect of damage suffered in the case of:

a. a person who has spent a period in custody pending trial but is subsequently not convicted; or

b. imprisonment or deprivation of liberty imposed by a final conviction which is subsequently annulled after reconsideration;

if it would be manifestly unjust to allow the injured person alone to bear the damage".

It emerges from the context as well as from the distinction between Principles I and II that no provision has been made for the case of liability stemming from a fault other than dolus or gross negligence. One may wonder whether this is because the authors of the draft were aware of the difficulty of proving a minor fault or because they considered that obliging public authorities to provide reparation for damage due to dolus or gross negligence on their part would in itself be a substantial step forward.

Principle II provides for two cases of liability in which the cause of liability lies not in a fault but in violation of the equality or balance between citizens in relation to public obligations. This is clear from the phrase "if it would be manifestly unjust to allow the injured person alone to bear the damage". The form of reparation provided for in the second paragraph of Principle IV is, furthermore, reparation in accordance with principles of equity, as in cases of fault-free liability for administrative acts. Given the scope of Principle I, which is limited to liability for dolus and gross negligence, it is logical and, moreover, consistent with the text of Principle II - which, by the words "in addition", seeks to be complementary to Principle I - that liability based on a minor fault should be treated in the same way as fault-free liability in the two cases covered by Principle II.

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Final observations

The draft recommendation relating to public liability for judicial acts is certainly limited in scope. It follows the pattern of the various Council of Europe instruments which have advanced and unified the law in a measured manner thanks to work by experts from the different member States which is distinguished by general goodwill but is also influenced by the need to reconcile legal conceptions and systems that sometimes differ widely.

The adoption of a recommendation in the field of public liability for judicial acts, even if it is limited in scope, is not without significance. At any rate, it would introduce into this area complementary protection to that which already exists under the European Convention on Human Rights and by virtue of which compensation (just satisfaction) can be accorded persons injured by certain acts performed by judicial authorities.

GENERAL REPORT

by

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The notion of public liability for judicial acts is admissible only where it is acknowledged that justice is fallible: not only that judges make mistakes, but that the judicial system itself is liable to err.

Except where arbitrary power excludes all liability, the two kinds of fallibility may be distinguished. Traditional Islamic law, for instance, admitted the one without recognising the other in so far as the Cadi could be called to account, but no appeal lay against his judgments. On the other hand, by the Middle Ages, the appeal instituted under the later part of the Roman Empire with the extra-ordinem procedure has become virtually indistinguishable in France from the action for misuse of authority (prise à partie), since the judge responsible for the disputed decision was required to defend it in person before the higher court.

We know, however, that at that time the purpose of the appeal was political rather than prophylactic. As in Rome, where it had been used to establish the authority of the Emperor, appeal was the medium through which the Monarchy sought to ensure the pre-eminence of the royal courts. The principal purpose was not to improve the administration of justice: a concern which did not arise until the Revolution, when it was proclaimed in the Decree of 16-24 August 1790.

Nonetheless, it was not unknown in pre-revolutionary France: the Order of 1667 abolished the "writ of error" (proposition d'erreur) introduced in the late Middle Ages, and replaced it by the application for retrial (requête civile). This covered a much wider field than its name suggests. In order to use this remedy, authorisation had to be sought in writing from the Chancellerie du Parlement; the application had to be couched in moderate (ie civil) language and contain no disrespectful criticism of the decision complained of. Thus the requête civile was "civil" in form and not ratione materiae.

Its purpose was to secure reparation for a miscarriage of justice, a spectre that haunts the mind of every judge and which re-emerges in the periodic cause célèbre (like that of Mauvillain who was finally acquitted by the Gironde Assize Court in June 1985). And yet one could argue, jokingly, that the error which causes justice to miscarry cannot be taken into account. Because "a single judge cannot be just", justice is normally dispensed by a bench of judges so if a shared error makes a law we would have to admit that no account should be taken of it (ie the error) in such conditions.

This argument was quite certainly not put forward when the 1806 Code of Civil Procedure was being drafted: Articles 480 to 504 provided eleven cases in which a retrial could be granted. Furthermore, Articles 505 to 516 dealt with the action against a judge who has misused his authority in which the plaintiff could be awarded damages and possibly have the judgment set aside. Also, Articles 443 to 447 of the 1808 Code of Criminal Procedure made provision for an application for retrial (révision) in a very limited number of cases.

The legislation on this subject has changed considerably over the years. Article 595 of the new Code of Civil Procedure specifies four grounds for an application to re-open civil proceedings (recours which replaces the former requête civile. Application for retrial (demandes en révision) are now governed by Articles 622 to 626 of the Code of Criminal Procedure. They have been the subject of considerable legislative changes since they were first introduced. An Act of 9 June 1867, passed in the wake of the campaign by the daughter of Mr Lesurques to obtain her father's rehabilitation (Mr Lesurques was executed in Year IV of the Republic as a result of the Lyons Mail Affair), provided for posthumous retrial and for setting aside the judgment without referring the case to a court for retrial in certain cases (révision sans renvoi) without reference to the trial court. An Act of June 1895 introduced new grounds for retrial and, in particular, made rules for compensating the damage suffered by the victim of a miscarriage of justice. This took two forms. In future the State was to provide pecuniary reparation. Secondly, the judgment ordering the retrial was to be published in the Official Journal - a symbolic, not to say platonic, measure.

Subsequently, an Act of 7 February 1933 established the personal liability of judges while providing that the financial burden would be borne by the State, as in the case of schoolteachers four years later (Act of 5 April 1937, amending Article 1384 of the Civil Code). Later still, the Act of 17 July 1970 amended Article 149 of the Code of Criminal Procedure which admits the liability of the State in regard to persons who have been acquitted, and who have suffered damage which is "manifestly abnormal and of particular seriousness" as a result of being detained on remand. There are, incidentally, some similarities between this and the concept of liability without fault in administrative law. In fact, this is the system which Mr Velu recommends in his report for cases where no fault has been committed by the authority.

The accepted principle in France at the time was that the State's liability could not be incurred in judicial matters. Mr Lemoine stated it perfectly in his submissions on the Giry judgment (Civ. 23 November 1956, D 1957-34): "The principle that the State may not be made liable for judicial errors is well known. But if one examines the fundamental reasons, the limitations of this principle become immediately apparent. The principle is founded on the authority that attaches to court decisions: they are deemed to expound the law exactly and establish the facts with absolute legal truthfulness ..... But the rule applies only to the court decision itself which is alone covered by an irrebutable presumption of legal truth, and not to any acts or operations carried out in the course of its preparation. There can be no justification for making this legal immunity apply to the whole process of administering justice".

Similarly, it was accepted at the time (Trib. Adm. de Caen, 20 February 1958, Gougaud, D. 1959-40, note by Georges Morange) that the State could not be held responsible for delay by the Jurisdiction Courts (Tribunal des Conflits) in reaching a decision, seeing that the procedure for deciding conflicting claims to exercise jurisdiction had been organised in the interest of the administration.

Such a formula would hardly be compatible with the precedent set by the Conseil d'Etat in the La Fleurette judgment (14 January 1938, D.P. 1938.3.41, Concl. Roujou, note Rolland, S. 1938.3.25, note P.L.). For in so far as the Conseil d'Etat accepted the principle of liability for damage caused by laws, it is impossible to see what objection could be raised to the idea of liability for judicial acts in the strict sense.

The Miscellaneous Purposes Act of 5 July 1972 can be commended for having added a new Section L.781-1 to the Courts Act, to the effect that "the State shall be liable to make good damage caused by the malfunctioning of the courts. This liability shall only arise if there has been gross negligence or a denial of justice". (c.f. Auby, La responsabilité de l'Etat en matière de justice judiciaire AJDA 1973 45 Lombard, La responsabilité du fait de la function judiciaire, RDP. 1975 585 s).

On a point of legal theory, raised by Mr Ludet during the discussion, it may be asked whether the effect of this Act was to produce a return to the previous position, reversing the case-law on extra-judicial acts initiated by the judgment in the Giry Case. In the absence of precedent, one must assume that the 1972 Act (which, as far as the point under review is concerned, resulted from a parliamentary initiative) cannot be interpreted in a manner inconsistent with its promotor's intention, which was that the law should progress and not move backwards. It follows that acts connected with the activity of the courts may be deemed to be subject to the principles of the ordinary law relating to public liability, whereas the system instituted by the 1972 Act would apply to judicial decisions in the strict sense.

However, following the judgment in the Blanco case (Trib. Conflits 8 February 1873, Rec. 1er suppl., p. 61, concl. David; DP.1873.3.17, concl. David; S.1873.2.153, concl. by David), the Conseil d'Etat (29 déc. 1978, Darmont, Rec. 542; D.1979.278, note Vasseur; R.D.P. 1979-1742, obs Auby; A.J.D.A. 1979, II, 45, note Lombard) refused to extend the rules laid down in the 1972 Act to the administration. It confined the State's liability to cases of gross negligence, except where this arose from the actual content of a binding decision (V.B. Pacteau, contentieux administratif, Paris 1985, no. 387-390).

This judgment has two implications: firstly, that public liability in this field is no substitute for an exhausted remedy and, secondly, that denial of justice is not covered by the Conseil d'Etat's judgment. Perhaps the latter omission can be explained in the light of Mr Early's contribution to the discussion. He asked Mr Velu and myself whether we considered it reprehensible, by European standards, for a court to refuse to refer to the Luxembourg Court a preliminary point raising issues under the Treaty of Rome. The French Conseil d'Etat is known to have well established case-law on the subject, and it might be tempting for an impertinent mind to see in the above-mentioned oversight a desire not to have to equate the consequent denial of right with the denial of justice referred to in the Act of 5 July 1972.

This growing tendency to segregate the administrative from the judicial is regrettable. Nevertheless, France does admit the principle of public liability for judicial acts. With regard to the existing law Professor Cappelletti's report surveys the question from the standpoint of comparative law (Cf "Who watches the watchmen?" Am. J Comp. L.1984, pages 1-62). As regards legislative policy, it may be asked whether the Council of Europe should not make a recommendation to its members on this point.

This, however, raises a preliminary question. During the discussion, Mr Donner asked Mr Velu whether the new recommendation should not encompass every aspect of miscarriage of justice instead of confining itself to injuries to the person and interference with personal freedoms. He was told in reply that the Human Rights Convention was restrictive on this point and that one could not reasonably go beyond its limits.

Even so, a number of helpful ideas emerged from the discussions no less than from the reports, and clarified the issue little by little by contributing some extremely interesting answers to the questions: What causes the damage? (I), Who causes the damage? (II) and Who is liable as guarantor? (III).

I. WHAT CAUSES THE DAMAGE?

The first essential is to agree on what a judicial act is. Mr Velu's report contains some valuable pointers to a definition. They can be summed up in the light of French legal literature, chiefly with reference to the work of Motulsky and Vizioz.

After reviewing the possible criteria and rejecting the formal criteria as inaccurate and the factual criteria as insufficient, Motulsky (cours de droit processuel, Paris, "Les cours de droit", 1973, pages 15-17) defines the judicial act as follows (similar definitions are given by Solus and Perrot, Droit judiciaire privé, vol. 1, Paris 1961, No. 468 et seq): "A judicial act is the application, according to particular forms and an appropriate technique, of a rule of law by a qualified organ with a view to settling a conflict of interests either by endorsing or by rejecting a legal claim submitted for its decision".

Motulsky was here restating Vizioz' definition, on which most authors agree. (Etudes de Procédure, Bordeaux, 1956, pages 241 and 242). "For an act to be a judicial act in the true sense and to produce the effects specific thereto (ie res judicata and rendering the tribunal functus officio) it is not sufficient that (from the organic standpoint) an officially appointed judge is involved or (from the formal standpoint) that both parties are heard: the further and essential requirement is that the judge should establish the the law on a specific dispute".

Here, as before, everything hangs on the definition of the dispute that the judge is called upon to settle. Vizioz (ibid, page 241) advocated the following definition: "The judicial function presupposes a contentious situation, ie a dispute or a conflict concerning the application of the law in a specific case which arises precisely because that application is disputed or uncertain".

Can the Council of Europe be asked to incorporate such a technical definition in a recommendation to member States?

This seems doubtful, for two decisive reasons:

. Firstly, such an attitude would be evidence of an unacceptable imperialism on the part of French legal science, for some member States of the Council of Europe have a totally different idea of what constitutes a judicial act. Ireland and Norway, for instance, do not make the distinction between judicial acts in the strict sense and the administrative acts of the judicial authorities required by the definition given above.

Secondly, any suggestion would make it impossible for the draft recommendation to keep strictly to the subject of inquiries to the person and interferences with personal freedoms.

This being so, and assuming that the liability under review is that resulting from miscarriage of justice in the broad sense, the definition of judicial acts would have to be widened and replaced by a formula similar to the one used in the French Act of 5 July 1972: "malfunctioning of the courts".

The answer to the purists who may object to this departure from the technical vocabulary is, firstly, that legislation is not a matter of using certain magic words; secondly (and most importantly), that in international law agreement on the meaning of words can be found only by compromise.

For instance, in The Hague Conference on Private International Law, reference is made not to domicile, a word used in continental Europe and in the Anglo-Saxon world to mean quite different things, but to residence. This also explains why Rabel, discussing this same subject (Das Problem der Qualifikation, Rabels Z 1931, page 241 et seq) suggested coining autonomous concepts for private international law that would be identical from one country to another, so as to avert what Kahn (Gesetzeskollisionen, Ein Beitrag zur Lehre des internationalen Privatrechts , Abhandlungen I, page 1 etc) called latent conflicts, that is to say conflicts on the classification of terms.

Anyone seeking to define what causes the damage has two avenues to choose from, a narrow one and a wide one. The narrow avenue will appeal to those wishing to limit public liability to injuries to the person and the interferences with personal freedoms: they will define the cause of damage as the judicial or para-judicial (eg police detention) act, causing such injury or interference. Those who advocate a general principle of public liability will prefer the wider avenue and favour a formula similar to the French definition mentioned earlier.

II. WHO CAUSES THE DAMAGE?

The person who first comes to mind as being likely to incur public liability in an action to secure reparation for damage originating in a judicial act is a judge or, at the very least, a person having a para-judicial function such as an officer of the Criminal Investigation Department. In determining that person's liability, reference will be made to a number of factors that help to characterise the fault from three standpoints: prevention, assessment and sanctions.

From the standpoint of prevention, care in making appointments to judicial office is a good guarantee. Mr Louis Blom-Cooper's report and the discussion that followed were extremely instructive on this point. Should they have professional knowledge of the matter in issue or be career judges? Should judges be elected, nominated or recruited by competitive examination? It is obvious that good administration of justice depends primarily on having a satisfactory method of recruiting judges.

From the standpoint of assessment, it is important to determine exactly how much discretion a judge may exercise and how much room for manoeuvre he has in regard to the dispute referred to him. This is the only way of knowing whether the alleged offender has committed a fault in adopting an attitude which any normally cautious and diligent colleague would have been careful to avoid. On this point Professor Kübler's report was particularly instructive. He showed us how, in a changing society, the judge could not possibly have the same role as at the time when the legal systems of the European States were beginning to establish themselves.

Where the exercise of the judicial function is concerned, we have come a long way since the 18th century when Montesquieu wrote in his Esprit des Lois: "The nation's judges are but the mouths that speak the words of the law. They are inanimate beings who can change neither the law's force nor its severity."

What Gény, in his Méthodes d'interprétation et sources called the "idolatry of the written and codified law" was repudiated long ago. It is nevertheless still true that however much liberty the judge may allow himself in regard to the law, he can hardly assume the role of a legislator. An example was given by Mr Donner in the course of the discussion: a Dutch court had refused to give a ruling on a matter which raised issues of sexual equality, saying that it saw no way of deciding which sex should set the standard for the other. Conversely, in countries such as Luxembourg, Belgium and France, Article 4 of the Civil Code requires the court to decide the issue before it even when the law offers no guidance.

Is the court revealing a new rule, or uncovering a hidden rule? In cases like this, the question remains open, and Mr Charlier's comments on the subject during the discussion would certainly not have been disallowed by Sir William Blackstone (Commentaries on the laws of England, Volume 1, 8th edition, pages 63 et seq), so closely did they follow his declaratory theory according to which an English judge when he breaks new ground is not making a new rule but revealing a concealed portion of the immemorial custom of the Realm.

Now that the object is no longer to state the rule but to apply the law, it should be noted that Articles 12 and 16 of the new French Code of Civil Procedure require the judge to raise of his own motion legal grounds resulting implicitly from the facts presented to the court on condition that each party is given an opportunity to argue the points raised. He thus has scope for manoeuvre which obscures the dividing line between normal conduct and misfeasance.

For comparison, we know that in private international law, Italy, the Federal Republic of Germany and Greece allow the judge to exercise his own initiative in examining the content of any foreign law applicable to the case. Consequently, any liability the judge may incur is to be measured by the yardstick of these powers and obligations.

However, consideration must also be given to the degree of autonomy vested in the judiciary. In France, for instance, the principle of judicial independence is not in dispute. Even so, the Executive has on several occasions in the past (see my commentary in D. 1978, page 7 in fine) trespassed on the preserve of the judiciary. Similarly, it will be remembered that one purpose of the Act of 15 January 1963 setting up a National Security Court in France was to undermine the effect of the Conseil d'Etat's Canal Judgment of 19 October 1962 (Lebon, 552; AJDA 1962, 612, note Laubadère; JCP 1963, 181, 13068, note Debbasch). This is a matter in which the main concern must be to weigh the responsibilities and assess the liability to pay damages on the basis of reasonable forseeable causation rather than by treating all contributory causes as being of equal weight.

From the standpoint of sanctions, or that of personal liability which Mr Morozzo della Rocca discusses outstandingly well, the legal system has at its disposal various instruments for keeping the judge within the bounds implied by the above considerations. It is possible from this angle to envisage six types of sanctions.

. Censure by newspapers and public opinion: When the press is allowed, or manages to obtain access to case-files, the public has the means of forming an opinion on its judges or at least their acts.

. Procedural sanction: For instance, a case may be taken out of the hands of the investigating judge under Article 84 of the French Code of Criminal Procedure.

. Criminal sanction: In discharging his duties a judge may commit an offence for which he must answer without being able to claim immunity. Such offences include the divulgation of professional secrets (cf Rennes 7 May 1979, Pascal, JCP 1980, II.19333, observation Chambon).

. Disciplinary sanction: Although this is not a common form of sanction, it has been used by the Conseil d'Etat (Conseil d'Etat 5 May 1982, Bidalou, D. 1984, 103, note F Hamon); however, it was not enforced owing to an amnesty.

. Professional sanction: Where the stick proves inadequate or ineffective, the carrot, in the form of career prospects, can be used to bring an unorthodox judge into line.

. Pecuniary sanction: The French Act of 7 February 1933 instituted the concept of pecuniary liability for judges while making provision for a State guarantee. (Cf André Henry, La responsabilité des magistrats en matière civile et pénale, DH 1933.97; Georges Lalou, commentary on the above law in DP 1933.4.65).

III. WHO IS LIABLE AS GUARANTOR?

Who pays for the damage? Once the principle of liability for judicial acts has been agreed, the question remains whether that liability should be public or private.

The answer will depend on whether we follow the European Convention on Human Rights or the International Covenant on Civil and Political Rights to which numerous member States of the Council of Europe have acceded.

The European Convention requires signatory States to lay down rules whereby the victim may obtain compensation from the person or persons responsible. The Covenant, according to the commentary of the United Nations Secretariat (see Mr Velu's report) provides that "the right to compensation, stated in general terms, seems to be enforceable both against individuals and against the State, regarded as a legal entity".

The system enshrined in the Covenant is undeniably more satisfactory from the victim's point of view than that of the Convention. The offender may very well not have the means to compensate his victim in full if he is not suitably insured. According to the authentic interpretation given by the High Authority in New York, the victim can shelter behind the tax-paying community which has an infinite capacity for taking punishment.

The Anglo-Saxon world and continental Europe also apply a further principle known in the former as vicarious liability and in the latter as the master's liability for his servant's torts. Equity requires that the authority in whose name justice is done should compensate the victim if reparation is due.

Here, however, one comes up against a formidable objection. According to the principle that the King can do no wrong, the State is immune from liability except as specified in a law such as the Crown Proceedings Act, 1947. In fact the argument has no legal basis. The reasoning here does not stem from the law as it is but from the law as it ought to be. This being so, the State itself would be expected to guarantee the payment of damages to every victim entitled to compensation.

So it was that in the Act of 7 February 1933, France undertook to guarantee the liability of its judges.

Having established the principle of the State's obligation to guarantee compensation, the question remains whether the State has a remedy against the judge who caused it to incur this liability?

In France, the answer to this question is contained in the Acts of 5 July 1972 and 18 January 1979, amending the Courts Act and the Statutes of the Judiciary respectively.

. Section L.731. 1 of the Courts Act: "The State shall make good the damage caused by the malfunctioning of the courts. This liability shall arise only in cases of gross negligence or a denial of justice".

- Article 11-1 of the Statute of the Judiciary: "Members of the judiciary shall be liable only for their 'personal faults'. This liability shall only arise on 'an action for indemnity by the State'.

These provisions do not appear ever to have been applied in practice. It may be noted, however, that the term personal fault can be defined in several ways: fault unconnected with the exercise of the judge's function, intentional fault etc.

Since this is a form of liability resulting from judicial acts in the technical sense, cases where the personal liability of the judge may be incurred will in fact be few in number. Where there is no provision for the minority to express its views in a dissenting opinion, the fact that the judges act as a body makes it impossible for the State to identify the offenders and so bring an action for indemnity.

Thus we can see that there is a whole sector of judicial activity in the broad sense that the Act of 18 January 1979 fails to cover.

A further point to make is one which the penetrating comments by Mr Morozzo della Rocca did much to clarify: it would be perfectly conceivable for the pecuniary remedy to be replaced by a range of disciplinary sanctions designed to match the seriousness of the personal fault committed, and even for the two systems to be combined by incorporating the action for indemnity in the list of sanctions.

There remains the question of whether this system of liability for fault could be coupled with a comparable system, ie the one existing in administrative law. This is what Mr Velu recommends when he proposes that rules relating to public liability based on fault should be reinforced by rules on public liability where no fault has been committed.

It must be said that this proposal has its attractions. Where an injury is so abnormal as to interfere with the principle of equality with regard to sacrifices borne for the benefit of the community, entitlement to compensation must be automatic, and no distinction based on the cause of damage should exclude damage of judicial origin from the principle of reparation. For this principle to be accepted, it is essential to reconcile it with that of res judicata. On this aspect, to return to an authority quoted earlier, the arguments expounded by Professor Georges Morange (D. 1959.40) provide ample clarification.

Furthermore, as already stated if liability for the effects of legislation is accepted, it is difficult to see on what principle one can respect any judicial acts in some extreme cases.

Essentially, then, the superiority of the French position lies in this: that it anticipated, and helped to shelter the public from, injustice committed in the name of the law ...

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LIST OF COLLOQUIES ON EUROPEAN LAW OF THE COUNCIL OF EUROPE

Colloquies held up to present:

1.	London, 1969	"Redress for non-material damage"
2.	Aarhus, 1971	"International mutual assistance in administrative matters"
3.	Würzburg, 1972	"The responsibility of the employer for the acts of his employees"
4.	Vienna, 1974	"Legal representation and custody of minors"
5.	Lyons, 1975	"Civil liability of physicians"
6.	Leiden, 1976	"Legal services for deprived persons, particularly in urban areas"
7.	Bari, 1977	"Forms of public participation in the preparation of legislative and administrative acts"
8.	Neuchâtel, 1978	"Standard terms in contracts"
9.	Madrid, 1979	"The liability of the state and regional and local authorities for damage caused by their agents or administrative services"
10.	Liège, 1980	"Scientific research and the law"
11.	Messina, 1981	"Legal problems concerning unmarried couples"
12.	Fribourg, 1982	"Principles and methods of preparing legal rules"
13.	Delphi, 1983	"International legal protection of cultural property"
14.	Lisbon, 1984	"Beyond 1984 : The law and information technology in tomorrow's society"
15.	Bordeaux, 1985	"Judicial power and public liability for judicial acts"